No. 89-44-CSX
Status: GRANTED

Title: Dennis Burnham, Petitioner
v.
Superior Court of California, County of Marin
(Francie Burnham, Real Party in Interest)

Docketed:
July 12, 1989

Court: Court of Appeal of California,
First Appellate District

Counsel for petitioner: Sherman,Richard

Counsel for respondent: Nelson,Robert L., Devereaux,James O., Breiner,Richard H.

Entry	Date	Note	Proceedings and Orders
1	Jul 12 1989	G	Petition for writ of certiorari filed.
3	Aug 7 1989	X	Brief of respondent Superior Court (Burnham, R.P.) in opposition filed.
2	Aug 9 1989		DISTRIBUTED. September 25, 1989
4	Oct 2 1989		Petition GRANTED.
			**********
5	Oct 16 1989		Record filed.
		*	Certified copy of original record received.
8	Oct 26 1989		Record filed.
		*	Certified copy of record received.
6	Nov 15 1989		Brief of petitioner Dennis Burnham filed.
7	Nov 15 1989		Joint appendix filed.
9	Dec 18 1989		Brief of respondent Francie Burnham, Real Party In Interest filed.
10	Jan 4 1990		Reply brief of petitioner Burnham filed.
11	Jan 5 1990		CIRCULATED.
12	Jan 5 1990		SET FOR ARGUMENT WEDNESDAY, FEBRUARY 28, 1990. (3RD CASE)
13	Feb 28 1990		ARGUED.

89-44

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JUL 12 1989
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CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1988

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent,

FRANCIE BURNHAM,

Real Party in Interest.

On Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is service of process on a non-resident defendant, while he is physically present in the forum state, a sufficient basis by itself for the exercise of personal jurisdiction?

Traditionally, physical presence in the state was sufficient to confer personal jurisdiction over the defendant, if he was served while in the forum. The question presented is whether that rule is still viable, in light of this Court's decision in *Shaffer v. Heitner*, 433 U.S. 186 (1978).

Although *Shaffer* did not involve service on a defendant who was present in the forum, this Court's opinion stated that the constitutionality of all exercises of state court jurisdiction must be tested by whether the non-resident defendant had sufficient contacts with the forum state to satisfy due process. Federal courts, and state courts, are in conflict on this constitutional issue, and have drawn different conclusions from *Shaffer* on the subject. The California Court of Appeal in the present case held that such service is still sufficient to establish personal jurisdiction.

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No. _____

In The

Supreme Court of the United States

October Term, 1988

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent,

FRANCIE BURNHAM,

Real Party in Interest.

On Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

PETITION FOR WRIT OF CERTIORARI

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall

any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure, section 410.10:

A court of this state may exercise jurisdiction on any basis not inconsistent with the Constitution of this state or of the United States.

DECISIONS BELOW

The trial court's original ruling was that California did not have personal jurisdiction over petitioner. (Appendix A.) It reconsidered that order, decided that personal jurisdiction existed, and denied petitioner's motion to quash service. (Appendix B.).

The California Court of Appeal, First Appellate District, Division Five, upheld the trial court in an unpublished decision. (Appendix C.) The California Supreme Court denied a petition for review. Justice Edward A. Panelli was of the opinion that review should have been granted. (Appendix D.)

JURISDICTION AND TIMELINESS

The California Supreme Court denied the petition for review on June 8, 1989. Petitioner invokes this court's certiorari jurisdiction under 28 U.S.C., section 1257 (3). *Kulko v. California Superior Court*, 436 U.S. 84, 90 fn. 4 (1977).

The decision of the California Court of Appeal is a final determination on the federal constitutional issue because it determined that California has personal jurisdiction over petitioner. Under California law, petitioner has no choice but to suffer a default judgment, or to enter a general appearance and defend on the merits, thus waiving his right to contest jurisdiction. *McCorkle v. City of Los Angeles*, 70 Cal.2d 252, 258; 74 Cal.Rptr. 389; 449 P.2d 453 (1969). Such a ruling is final for the purpose of this Court's jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, at 195 Fn. 12 (1977).

STATEMENT OF THE CASE

Petitioner Dennis Burnham (hereafter "husband") and real party in interest Francie Burnham (hereafter "wife") married in 1976 and moved to New Jersey in 1977. Their children were born in New Jersey and the family lived there until the parties separated in 1987.

Husband and wife executed a marital settlement agreement in New Jersey in 1987. It provided for a division of marital property, custody of the children to wife, reasonable and liberal visitation with the children to husband, alimony and child support. The agreement stated that it was to be interpreted in accordance with New Jersey law.

Shortly after executing the agreement, with husband's consent, wife and the children moved to California. Husband remained in New Jersey and filed for divorce, based on the agreement. Wife then took the position that the agreement was invalid, and that all of

their marital rights should be litigated in California. She filed the underlying action and had husband personally served, while he was in California to visit with their children.

Husband appeared specially and made a motion to quash service of summons. He argued that: (1) under *Shaffer v. Heitner, supra,* 433 U.S. 186, service on him while he was in California could not confer personal jurisdiction in the absence of sufficient contacts with California to satisfy due process; and (2) he did not have sufficient contacts with California, for it to exercise personal jurisdiction over him under *Kulko v. California Superior Court, supra,* 436 U.S. 84 and similar decisions.

New Jersey is where husband resides, works, votes, files state income tax returns, has his driver's license, registers his vehicles, and maintains all of his bank accounts. Husband has never been a resident or a domiciliary of California. He has never voted in California and has never filed a California state income tax return. Husband has never owned any real property or any personal property in California. He does not have a license to do business in California, does not pay any sales tax in California, and does not have a business address in California.

Wife consistently took the position that she did not have to satisfy the minimum contacts test. She relied on section 28 of the Restatement, Conflict of Laws, for the principle that "a state has power to exercise judicial jurisdiction over an individual who is present within its territory, whether permanently or temporarily." She argued that service by itself is a sufficient basis for personal

jurisdiction, and that *Shaffer* did not change the law in this regard. She stated: "While counsel for [husband], or anyone else, may speculate regarding what the U.S. Supreme Court *might* do when the question is properly presented to it, the fact is that the Supreme Court has never abrogated the principle set forth in Restatement § 28." (Emphasis in original.)

The trial court originally held that husband was not subject to personal jurisdiction in California. (Appendix A.) Wife requested reconsideration. The parties again argued over whether service on husband while he was physically present in the state could be a basis for personal jurisdiction. The trial court specifically asked husband's counsel if she knew of any decisions on this issue " . . . in which the husband or the defendant was served in the State of California." Husband's counsel was not aware of any. The trial court then changed its mind. It found that California had personal jurisdiction and denied husband's motion to quash. (Appendix B.)

Husband filed a petition for writ of mandate in the California Court of Appeal on November 8, 1988. The Court of Appeal denied it on April 7, 1989. (Appendix C.) Its decision stated that " . . . personal presence continues to be a valid jurisdictional predicate for in personam jurisdiction, and that *Shaffer v. Heitner, supra,* 433 U.S. 186 does not compel a contrary conclusion."[1]

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[1] The Court of Appeal decision noted that husband came to California for the dual purpose of visiting his children and doing business. It did not, however, uphold the exercise of personal jurisdiction on this basis. Rather, it was responding to

(Continued on following page)

Husband sought review in the California Supreme Court. His petition was denied on June 8, 1989. Justice Edward A. Panelli was of the opinion that the petition should have been granted. (Appendix D.)

REASONS FOR ISSUING THE WRIT

I. THIS COURT SHOULD DECIDE WHETHER A STATE COURT CAN EXERCISE PERSONAL JURISDICTION OVER A NON-RESIDENT DEFENDANT, SOLELY BECAUSE HE WAS SERVED WITH PROCESS WHILE HE WAS PHYSICALLY PRESENT IN THE FORUM.

A. This Court's Reasoning In *Shaffer v. Heitner* Suggests That Jurisdiction Based Solely On Service On A Non-Resident While He Is Physically Present In The Forum State Is No Longer Constitutional.

Traditionally, service of process on a non-resident defendant while he was physically present in the state was sufficient to confer personal jurisdiction over him for all purposes. The theory underlying this view was that a

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husband's argument that exercising jurisdiction on this basis would thwart California's public policy of encouraging visitation. Nor could the Court of Appeal have done so constitutionally upheld jurisdiction on any basis other than the fact that husband was served while in California. Wife's family law action was unrelated to husband's minimal business contacts with California. He would attend trade shows in California in order to defray some of the expenses of traveling across the country to visit his children. This is discussed briefly in section II.A. below.

state has power over anyone who is found within its boundaries. That notion has long been subjected to cogent criticism. See, e.g., Leflar et al., *Transient Jurisdiction – Remnant of Pennoyer v. Neff: A Round Table,* 9 J.Publ.L. 281 (1960); Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens,* 65 Yale L.J. 289 (1956).

The question presented here is whether the traditional view was fatally undermined by the reasoning of this Court's decision in *Shaffer v. Heitner, supra,* 433 U.S. 186 and should now be explicitly rejected.

Shortly after *Shaffer* was decided, one commentator explained why *Shaffer* sounded the death knell for the traditional view of personal jurisdiction based on service in the forum. Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction,* 25 Vill.L.Rev. 38 (1979). Numerous subsequent articles have questioned the continued validity of the traditional view, but this court has yet to address the subject. See list of articles in *Nehemiah v. Athletics Congress of U.S.A.,* 765 F.2d 42, 47 (3d Cir. 1985) where the Third Circuit stated that a growing number of commentators have reached the conclusion that after *Shaffer,* " . . . it is difficult to find a basis in logic and fairness" for the traditional rule.

As discussed below, decisions of the federal and state courts are in conflict on the question. The California Court of Appeal decision here cited the line of authorities which supported its conclusion, and ignored the contrary authorities.

A decision by this court is necessary because the issue is an important and recurring one. In our highly

mobile society, people often travel to another state for a variety of reasons. They have the right to know whether they can be subjected to extensive litigation, if they are served while visiting the state chosen by the plaintiff as the forum. A brief reflection on how this Court reached its decision in *Shaffer* will serve to explain why the traditional rule is ripe for rejection.

In *Shaffer*, the plaintiff filed a stockholder's derivative suit in Delaware against Greyhound Lines, Inc. He claimed that the defendants had engaged in activities in Oregon which resulted in damages being assessed against Greyhound in an anti-trust action. The basis for his assertion of jurisdiction over the defendants was that they owned stock in the corporation, which was located in Delaware, as a matter of law under Delaware statutes. Delaware held that it could exercise "quasi in rem" jurisdiction over the defendants, based on their stock being located in Delaware. It was therefore not necessary for the defendants to have had any other contact with Delaware. At pp. 189-195.

This Court reversed. It held that the presence of property in a state is insufficient to give it personal jurisdiction over a non-resident. Rather, whether Delaware could constitutionally exercise jurisdiction depended on whether the defendants had sufficient contacts with the state, to make its exercise of jurisdiction fair and reasonable under all of the circumstances. At pp. 195, 212, 217.

Shaffer first reviewed the evolution of jurisdictional concepts, starting with *Pennoyer v. Neff*, 95 U.S. 714 (1878). At pp. 196-206. It held that the identical principles which

apply to personal jurisdiction on the basis of a non-resident's activities in the forum should now apply when jurisdiction is asserted on the basis of property ownership in a state. At pp. 207-212. It concluded that " . . . all assertions of state court jurisdiction must be evaluated by the standards set forth in *International Shoe* and its progeny." At p. 212, emphasis added. Thus, the mere presence of property in the state is no longer sufficient by itself to give the state any jurisdiction over the property owner, except perhaps for causes of action which directly arise out of the property ownership itself. At pp. 207-208, 213.

Shaffer thus destroyed the foundation for the view that service on a non-resident defendant while he is present in the state will suffice. The reason that personal service was traditionally considered sufficient to permit jurisdiction, is the very reason that was rejected in *Shaffer*. Traditionally, a state was said to have power over any person or property found within its territorial boundaries. The mere presence of the person, or the property, was sufficient to give the state such power. See discussion in *Shaffer* at pp. 196-200.

Shaffer established that the mere presence of property in a state is not an adequate basis for quasi in rem jurisdiction. By parity of reasoning, the physical presence of a non-resident in a state can no longer be deemed constitutionally sufficient to permit personal jurisdiction over him. The question in all situations must be whether the non-resident defendant has sufficient contacts with the state to make the litigation there appropriate.

B. The Decisions Are In Conflict On What Implication To Draw From *Shaffer.*

Contrary to the statement in the California Court of Appeal's decision, other jurisdictions do not all support retention of the traditional view. In fact, the decisions are in conflict on this issue.

In *Nehemiah v. Athletics Congress of U.S.A., supra,* 765 F.2d 42 (*not* cited by the Court of Appeal) the Third Circuit interpreted *Shaffer* as undermining the traditional rule. It held, by analogy, that service on an agent for an unincorporated association while he was present in the forum did not give the state jurisdiction over the association. At p. 47.

Harold M. Pitman Co. v. Typecraft Software, 626 F.Supp. 305, 310-313 (N.D.Ill. 1986) (*not* cited by the Court of Appeal) made a thoughtful analysis of *Shaffer.* It concluded that service on a defendant in the forum no longer by itself confers personal jurisdiction. It stated that the test must now be "whether the defendant has had minimum contacts with the forum such that maintenance of the suit does not offend traditional notions of fair play and substantial justice." At p. 312.

Bershaw v. Sarbacher, 700 P.2d 347, 349 (Wash.App. 1985) (*not* cited by the Court of Appeal) held that under *Shaffer,* personal service on the defendant while he was present in the state was insufficient in a family law context. There, a paternity action was served on the defendant while he was visiting the plaintiff and the child in Washington. The trial court granted his motion to dismiss for lack of personal jurisdiction, and the Washington

Court of Appeals affirmed. See also *In re Marriage of Markowski,* 749 P.2d 754, 756 fn. 2 (Wash.App. 1988).

The California Court of Appeal here relied on *Donald Mantor Co., Inc. v. Davis,* 543 f.2d 419 (1st Cir. 1976) and *Aluminal Industries, Inc. v. Newtown Commercial Assoc.,* 89 F.R.D. 326, 329 (S.D.N.Y. 1980). Both of these decisions held that personal service on the non-resident defendant while he was present in the forum was sufficient. *Mantor,* however, was decided before *Shaffer. Aluminal* relied on *Mantor* without making any analysis.

In *Amusement Equipment, Inc. v. Mordelt,* 779 F.2d 264 (5th Cir. 1985) (cited by the Court of Appeal), the Fifth Circuit undertook an analysis of the problem, and embraced a variant of the traditional view. At pp. 267-270. It thought that *Shaffer* did not overturn the traditional view, but stopped short of holding that service, without more, is automatically sufficient in all cases. At p. 270, fn. 15.

Rittenhouse v. Mabry, 832 F.2d 1380, 1388-1389 (5th Cir. 1987) subsequently described *Amusement Equipment* as having reaffirmed the constitutionality of the traditional view. It upheld the exercise of jurisdiction simply because the defendant was served in the forum.

In *Cariaga v. Eighth Judicial Dist. Court,* 762 P.2d 886 (Nev. 1988) (cited by the Court of Appeal), the Nevada Supreme Court embraced the traditional view. It noted that in spite of *Shaffer* this Court has never explicitly held that a showing of minimum contacts is necessary to establish jurisdiction if the defendant is served while he is present in the forum. (At pp. 887-888.)

The California Court of Appeal also relied on *Oxmans' Erwin Meat Co. v. Blacketer,* 273 N.W.2d 285 (1979). It did not reach the issue because the facts of the case did not require it. At p. 287. The opinion actually noted that the authors of the draft of the Restatement Second of Judgments considered *Shaffer* to have undermined service on the defendant while present in the state as being a permissible basis for personal jurisdiction.[2] At p. 287, fn. 4.

C. This Issue Has An Especially Important Impact On Divorced Families With Children.

This jurisdictional issue has national significance for litigation of all types, because it can impact on any person who travels to another state for any reason. See, e.g., *Cariaga v. Eighth Judicial Dist. Court, supra,* 762 P.2d 886, where Nevada exercised jurisdiction over a non-resident defendant in an action arising out of a slip and fall accident which had occurred at the defendant's home in California, simply because the defendant was served when he came as a tourist to Nevada to visit friends.

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[2] The recent 1986 draft of revisions to the Restatement Second, Conflict of Laws section 28, contains an extensive discussion of *Shaffer.* At pp. 40-42. It notes that *Shaffer* held that the presence of property in a state only gives the state jurisdiction in situations where it would be reasonable. The drafters therefore concluded: "It must likewise follow that considerations of reasonableness qualify the power of a state to exercise personal jurisdiction over an individual on the basis of his physical presence within its territory. . . . Jurisdiction will be lacking, however, when the sole basis for its exercise is the momentary presence within the state of the individual involved unless the special circumstance of the case make its exercise reasonable." At p. 41.

The issue arises here in a context which has a major impact on an important public policy: encouraging parents to spend time with their children who live in another state. If personal jurisdiction for all purposes can be obtained by the simple device of serving a non-resident parent while he is in a state for the purpose of spending time with his children, the policy of encouraging parental visitation with children will be thwarted. To set the family aspect of this problem in perspective, a brief overview of jurisdictional concepts in that area will prove helpful.

A state can terminate a marriage without personal jurisdiction over the non-resident spouse because the presence of one spouse alone gives a state jurisdiction over marital status. *Williams v. North Carolina,* 317 U.S. 287 (1942). A state can also adjudicate issues regarding child custody and visitation, if the conditions of the Uniform Child Custody Jurisdiction Act are met because this is a question of subject matter jurisdiction and again only involves status. See, e.g., California Civil Code, §§ 5150 et seq. and *Kumar v. Superior Court,* 32 Cal.3d 689, 695-702; 186 Cal.Rptr. 772; 652 P.2d 1003 (1982).

Jurisdiction for those limited purposes does not give a state personal jurisdiction over a non-resident spouse or parent for any other matters. A state court cannot divide property and make orders for child support, spousal support, or attorney's fees, unless it has personal jurisdiction over the non-resident. *Kulko v. California Superior Court, supra,* 436 U.S. 84.

It has been recognized that it would discourage parents from visiting their children, if that conduct could subject them to family law litigation in the state. See, e.g.,

Kumar v. Superior Court, supra, 32 Cal.3d 689, at pp. 703-704. In *Kulko,* the non-resident parent was not personally served in the forum state. Nevertheless, the result in *Kulko* certainly would not have been different if the father had traveled to California to visit his children and been served while he was there.[3]

II. THERE IS NO OTHER BASIS FOR CALIFORNIA'S EXERCISE OF PERSONAL JURISDICTION OVER HUSBAND, AND WIFE HAS OTHER ADEQUATE REMEDIES.

Wife's answer to husband's petition for review in the California Supreme Court took the position that California had personal jurisdiction apart from the service on husband while he was in California to visit the children. She also argued that husband should be denied any relief because he was not paying her support. Husband expects wife to make these same assertions in her answer to this petition. In order to facilitate this court's decision on whether to grant certiorari, husband will briefly explain why wife's positions have no merit.

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[3] The California Court of Appeal in the present case seemed to think that exercising personal jurisdiction would not discourage husband from spending time with his children because he was coming to California for business reasons. This was incorrect because husband's business in California was only to attend trade shows, which he arranged in a manner that would minimize his expenses in traveling across the country to visit with his children. Moreover, as explained in section II.A., these business contacts do not permit the exercise of personal jurisdiction over husband in wife's family law action.

A. California Does Not Have Personal Jurisdiction Over Husband Based On His Contacts With California.

As an alternative argument, wife contended that husband had sufficient contacts to satisfy *Kulko* because he did some business in California. This is incorrect, for the following reasons.

California's long arm statute, Code of Civil Procedure section 410.10, permits it to exercise personal jurisdiction on any basis which satisfies the United States Constitution. Under this law, doing business in a state only permits the exercise of personal jurisdiction on causes of action which arise out of that business. *McGee v. International Life Ins. Co.,* 355 U.S. 220, 223 (1958). See also, the Judicial Council Comments to California Code of Civil Procedure section 410.10. West's Annotated Code, p. 468 (1973).

Wife's family law action certainly does not arise out of what little business contact husband had with California. See, e.g., *Judd v. Superior Court,* 60 Cal.App. 3d 38, 44; 131 Cal. Rptr. 246 (1976) where the California Court of Appeal made this point in the context of a family law action. California has recognized that it also does not have jurisdiction over a non-resident parent who combines his trips here to visit his children with some business. *Modlin v. Superior Court,* 176 Cal.App. 3d 1176, 1179-1182; 222 Cal.Rptr. 662 (1986).

Nor are husband's contacts sufficient to give California "general" jurisdiction over a cause of action that does not arise out of his business. Such jurisdiction only exists when the defendant's contacts with the forum state are

wide-ranging, continuous, and substantial. *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445-449 (1952). That did not occur here. For instance, in *Cornelison v. Chaney*, 16 Cal.3d 143, 146-149; 127 Cal.Rptr. 352; 545 P.2d 264 (1976) general jurisdiction was not exercised over a defendant who had an abundance of contacts with California which were far greater than husband had here.

Husband's business contact with California here was insufficient to meet the minimum contacts test of *Kulko*. Indeed, the trial court originally concluded that husband did not have sufficient contacts, and held California did not have personal jurisdiction over him. (Appendix A2.) Wife made a motion for reconsideration, which argued that the minimum contacts test did not have to be met because husband was served while he was physically present in California. The trial court then changed its mind. (Appendix B3.) Thus, if husband had not been served in California, his challenge to jurisdiction would have been sustained.[4]

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[4] The trial court's order states that it also considered the New Jersey trial court's refusal to exercise jurisdiction. (Appendix B3.) Nothing in the New Jersey order adjudicates whether California can exercise personal jurisdiction over husband. The sole issue before the New Jersey court was whether it should dismiss husband's divorce action because he had not complied with a New Jersey statute, which requires a summons to be served within ten days after it is issued. Husband appealed from the New Jersey order because the trial court there had the discretion to allow him to proceed with the action.

(Continued on following page)

The Court of Appeal explicitly upheld personal jurisdiction over husband on the ground that service on a non-resident defendant while he is in the forum is still a valid basis for the assertion of personal jurisdiction after *Shaffer*. (Appendix C5.) Thus, the federal constitutional issue is directly and cleanly presented by the present case. Any attempt by wife to cloud the issue should be rejected.

B. Wife Has Other Adequate Remedies.

After it denied husband's motion to quash, the California trial court made an order for temporary support and attorney's fees. Husband did not comply with that order and he was held in contempt. Sentencing was deferred to give husband an opportunity to attempt to overturn California's assertion of personal jurisdiction. If California does not have personal jurisdiction over husband, then the underlying order is invalid and the contempt would have to be annulled.[5]

On June 30, 1988, the trial court stayed all further proceedings in California while this court considers husband's petition for writ of certiorari, on the condition that

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The only part of the New Jersey order which touches on the issue of jurisdiction is its comments regarding where child custody and visitation should be litigated under the Uniform Child Custody Jurisdiction Act. It thought that those issues should be resolved in California. Which state would be a better forum for those issues has nothing to do with the federal constitutional issue presented here.

[5] The contempt determination was never reduced to a formal written order.

husband pay wife an amount equal to what becomes due under the temporary support order. On July 5, 1989, husband sent wife a check for $37,400, in compliance with that ruling. Under California Civil Code section 4356, and Code of Civil Procedure sections 418.10, subdivision (d) and 418.11, these aspects of the litigation do not constitute a general appearance by husband.[6]

Nonetheless, wife might continue to argue that the ruling which husband challenges should be upheld on "fairness grounds". This is not a reason for refusing to grant certiorari, for several reasons.

First, as pointed out above, husband is now paying wife funds equivalent to the amounts ordered for temporary support and attorneys fees in California. Second, New Jersey provides a forum in which wife can obtain further orders if necessary. In fact, wife is ably represented by New Jersey counsel, who is actively resisting husband's attempt to proceed with his divorce action in New Jersey.

This court made a similar point in *Kulko*. There, the mother sought an increase in child support in California, after the children moved there. This Court held that California did not have personal jurisdiction over the father, who had remained in New York. In rejecting the mother's argument that California should have jurisdiction because of its interest in insuring that children who reside in the state receive adequate support, this Court

---

[6] The stay order had not been reduced to writing by the time this petition was printed, and therefore could not be included in the appendix.

pointed out that the mother could institute an action in New York to obtain child support. 436 U.S. at pp. 98-100.

Third, the parties' marital settlement agreement requires husband to pay alimony, child support, and other substantial sums to wife. No court has actually invalidated that agreement. The California trial court has not yet considered whether the agreement should be invalidated. The New Jersey trial court in husband's divorce action criticized the agreement, but the issue of its validity was not before it. None of that court's comments has any res judicata effect on the validity of the agreement.[7]

Husband made all payments due under the agreement from the time that it was executed until six months after wife claimed that it was invalid and instituted the underlying family law action in California. While wife's California action has been pending, husband has been depositing the amounts due under the agreement into an escrow in New Jersey. Those funds, less what husband will have paid to wife as a result of the condition the trial court imposed when it stayed all further proceedings in California, can be made available to wife if appropriate agreements are made so that husband does not concede California's jurisdiction and he is allowed to spend time with his children there.

---

[7] The New Jersey court could not have set aside the agreement because it never took jurisdiction over the case. Indeed, it recognized it was not actually ruling on the validity of the agreement. It stated that child custody might become a dispute, " . . . *should* a court find the property settlement agreement unenforceable." (Emphasis added.)

The reality is that wife decided to forum shop. She simply prefers to litigate against husband in California. If wife were dissatisfied with the marital settlement agreement, she could have, and should have, challenged it in the New Jersey courts before she left there and came to California. See *Kulko v. California Superior Court, supra,* 436 U.S. 84, 97 [basic considerations of fairness point to litigating in the defendant's home state when it was the wife who left the marital domicile].

Thus, wife's lack of funds, if any, is really a "self-inflicted wound". It should not be used as a basis for denying husband's legitimate claim that the United States Constitution prohibits California from exercising personal jurisdiction over him.

CONCLUSION

For all of the foregoing reasons, and based on the foregoing authorities, it is respectfully submitted that certiorari be granted and that this court hold that California cannot exercise personal jurisdiction over husband.

Dated: June 30, 1989

Respectfully submitted,

RICHARD SHERMAN
DE GOFF AND SHERMAN

CECILIA LANNON

BY RICHARD SHERMAN

Counsel of Record
for Petitioner
Dennis Burnham

APPENDIX A

CASE NUMBER: FL 1003

(Filed Sep. 8, 1988)

ROBERT L. NELSON (415) 479-1911
A PROFESSIONAL CORPORATION
35 Mitchell Blvd.
San Rafael, CA 94903
ATTORNEY FOR *(Name):* Petitioner Francie Burnham

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MARIN

PETITIONER: FRANCIE BURNHAM

RESPONDENT: DENNIS BURNHAM

FINDINGS AND ORDER AFTER HEARING

* * *

Motion to Quash Service of Summons/Dismiss the Action

This proceeding was heard as follows:

1. Date: 6-30-88
   Dept.: 6
   Judge: Richard H. Breiner
   Attorney present in court: Robert L. Nelson
   Attorney present in court: Cecilia D. Lannon

   * * *

   On the Motion filed 4-12-88
   By: Respondent Dennis Burnham
2. Evidence was presented and the matter was submitted.

* * *

19. Respondent's Motion to Quash Service of Summons and to Dismiss is denied, since the Court finds that it has jurisdiction over the marital status, and therefore summons cannot be quashed. However, the

court finds that it has no personal jurisdiction over respondent over any other issue except for marital status.

Date: September 8, 1988 /s/ Richard H. Breiner
JUDGE OF THE SUPERIOR COURT

* * *

APPENDIX B

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

In re the Marriage of	) No. FL 1003
Petitioner: FRANCIE BURNHAM	) ORDER GRANTING MOTION FOR RECONSIDERATION, VACATING SEPTEMBER 8 ORDER AND DENYING MOTION TO QUASH
and	)
Respondent: DENNIS BURNHAM	)
_____	) (Filed Oct. 5, 1988)

Having heard petitioner's motion to reconsider and reviewing the entire file, including particularly the order of the New Jersey Superior Court refusing to exercise jurisdiction and the statement of reasons set forth in the June 3, 1988 order of that Court, and for good cause,

IT IS HEREBY ORDERED:

1. That petitioner's motion for reconsideration is granted.

2. That on reconsideration, this Court's Order filed September 8, 1988 is vacated.

3. That respondent's motion to quash is denied in its entirety.

4. That the court finds, based on the evidence submitted, that it has jurisdiction, both *in rem* and *in personam*, over the subject matter and the parties, respectively.

DATED: OCTOBER 5, 1988

/s/ Richard H. Breiner
RICHARD H. BREINER
Judge of the Superior Court

APPENDIX C

COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION FIVE

DENNIS BURNHAM, Petitioner, v. SUPERIOR COURT, COUNTY OF MARIN, Respondent, FRANCIE BURNHAM, Real Party in Interest.	A044090 Marin County Superior Court No. FL1003 (Filed Apr. 7, 1989)

BY THE COURT:

After full briefing and consideration of the issues raised therein, as well as the court's independent research, the petition for writ of mandate is denied. The court concludes that personal presence continues to be a valid jurisdictional predicate for *in personam* jurisdiction, and that *Shaffer v. Heitner* (1977) 433 U.S. 186 does not compel a contrary conclusion. As the trial court noted, no California or United States Supreme Court case has applied *Shaffer's* "minimum contacts" analysis to a defendant present in the forum state and personally served with process. Those cases which have considered the issue have ruled that *Shaffer* does not preclude a finding of personal jurisdiction based on presence. (See, e.g., *Amusement Equipment, Inc. v. Mordeldt* (5th Cir. 1985) 779 F.2d 264; *Aluminal Industries v. Newtown Commercial Assoc.* (S.D.N.Y. 1980) 89 F.R.D. 326; *Cariaga v. District Court*

(Nev. 1988) 762 P.2d 886; *Oxmans' Erwin Meat Co. v. Blacketer* (Wis. 1979) 273 N.W.2d 285; see also *Donald Manter Co., Inc. v. Davis* (1st Cir. 1976) 543 F.2d 419.)

In light of the evidence presented to the trial court that petitioner's within California was for the dual purposes of visitation and conducting business activities, the imposition of personal jurisdiction in this case will not act to discourage parental visitation. (Cf. *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 45.)

APPENDIX D

ORDER DENYING REVIEW

AFTER JUDGMENT BY THE COURT OF APPEAL

First Appellate District, Division Five, No. A044090
S009795

(Filed June 8, 1989)

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

IN BANK

DENNIS BURNHAM, Petitioner

v.

MARIN COUNTY SUPERIOR COURT, Respondent

FRANCIE BURNHAM, Real Party In Interest

Petition for review DENIED.

Panelli, J., is of the opinion the petition should be granted.

/s/ LUCAS
Chief Justice

Supreme Court, U.S.
FILED
AUG 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-44

In The

Supreme Court of the United States

October Term, 1988

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent.

FRANCIE BURNHAM,

Real Party in Interest.

On Writ of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

May the State of California exercise personal jurisdiction over a non-resident where he is personally served with the Petition and Summons while physically present within that State during one of several recurring visits to that State?

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DECISIONS BELOW

The decisions of the California State Courts have been accurately set forth in the Appendices to the Petition for Writ of Certiorari filed in this Court, except that Appendix C (decision of the Court of Appeal) contains a clerical error. An accurate reproduction of the Court of Appeal decision is included herein as Appendix I. None of the decisions below have been published and, thus, there are no official citations.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fourteenth Amendment, United States Constitution:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure, section 410.10:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States.

JURISDICTION AND TIMELINESS

The jurisdiction of this Court in this matter is founded upon 28 U.S.C., section 1257 (3). The Petition for Writ

of Certiorari was received by Appellate Counsel for Real Party in Interest, Francie Burnham, on July 10, 1989. This Brief in Opposition to the Petition is timely filed on or before August 9, 1989 as provided in Rule 22.1 of the Rules of the Supreme Court of the United States.

STATEMENT OF THE CASE

Petitioner, Dennis Burnham, (hereinafter "Husband") and Real Party in Interest, Francie Burnham, (hereinafter "Wife") were married in 1976 and lived in the State of New Jersey from 1977 until they separated in 1987. In July of 1987, with Husband's consent and assistance, Wife and the two minor children born of the marriage moved from New Jersey to California where they have resided ever since. Husband purchased the airline tickets for Wife's and the children's flight to California and he drove them to the airport on the day of their departure.

Subsequent to Wife and the children's establishing their residence in California, Husband filed two separate divorce actions in New Jersey and both of those actions were dismissed by the New Jersey Superior Court. On July 24, 1989 both orders of dismissal were upheld on appeal. (Appendix II)

On January 5, 1988, Wife filed a Petition for Legal Separation in California and the Petition and Summons were personally served upon Husband in Mill Valley, California on January 24, 1988. At the time Husband was served, he was in California on one of his periodic trips to California. That particular trip had begun on January 18, 1988 when he was initially in Southern California on

business and then, later, flew to the San Francisco Bay Area to visit his children. Prior to that trip to California Husband had, most recently, visited California during the last week in October, 1987 (October 23, through October 30) at which time he *conducted* a business seminar on specialty advertising in the Napa Valley and then, on the weekend after the seminar, he attended his daughter's eighth birthday party in Marin County, California. He traveled to California again in December of 1987. During the months subsequent to his being served with Wife's Petition and Summons, Husband continued to make his periodic trips to California in which he both attended to his own personal and business affairs and spent some time visiting with his children. Evidence was submitted to the Superior Court that Husband had made at least one business trip to California each year during the entire eleven-year period of the parties' marriage, except for 1984. Husband has acknowledged taking advantage of tax benefits resulting from his business trips and activities in California.

In June of 1988 husband filed a Motion to Quash Service of the Summons and to dismiss the California proceedings and the Trial Court initially found that it had jurisdiction over the marital status but not over Husband *in personam*. On October 5, 1988, the Superior Court in California granted a reconsideration of its prior Order of September 8, 1988 and determined that it had personal jurisdiction over Husband. On November 4, 1988, the Superior Court denied Husband's Motion for Reconsideration of the October 5 Order. In the Trial Court Wife argued that California could properly exercise personal

jurisdiction over Husband both because he was personally served with process while present during one of his periodic trips to California and because under the particular facts of the case as presented to the Trial Court, Husband had sufficient minimum contacts with the State of California. On April 7, 1989 the California Court of Appeal denied Husband's Petition for Writ of Mandate which had been filed on November 8, 1988 and upheld the Superior Court's decision to exercise personal jurisdiction over Husband. Husband then filed a Petition for Review in the California Supreme Court, seeking review of both the personal jurisdiction issue and an issue of procedure relating to extraordinary writ practice under California State law. On June 8, 1989 the California Supreme Court denied the Petition for Review.

REASONS WHY PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Shaffer v. Heitner Is Not Dispositive Of The Issue Presented In This Case

As husband recognizes in his Petition, *Shaffer v. Heitner* 433 U.S. 186 (1977) does not involve either personal jurisdiction over a non-resident or physical presence of a non-resident person within the boundaries of the forum state. In *Shaffer* the question was whether the forum state (Delaware) could exercise *quasi in rem* jurisdiction on the basis that a non-resident defendant's stock in a Delaware corporation was "present" within Delaware, by operation of law. This Court held that such a basis was not sufficient for the exercise of *quasi in rem* jurisdiction. In contrast, the present case raises an issue of

in personam jurisdiction under the circumstances that Husband, the non-resident respondent, was physically present in California not on just one occasion but on recurring occasions for a variety of purposes, both before and after service of process, as well as at the time of service. One of those purposes (visiting with his children) for which he was present in California on a number of different occasions, including the one during which he was served with process, is directly connected with the litigation in which he was served and which is the subject of the present proceedings in this Court. Thus, this case presents a far different factual and legal situation than that presented in *Shaffer*.

This case does not present a question of "mere" presence nor one of "casual" nor "momentary" nor "transitory" presence. Thus, this is not an appropriate case for this Court to consider whether such fleeting presence constitutes a sufficient basis for the exercise of personal jurisdiction. It is a settled proposition that this Court does not render advisory opinions nor does it decide abstract, hypothetical or contingent questions. It will not decide constitutional questions in advance of the necessity to do so or formulate a rule of constitutional law broader than is required by the precise facts to which its decision is to be applied. See *Alabama State Federation of Labor v. McAdory* 325 U.S. 450 (1944).

This Case Does Not Present An Unresolved Question Of Federal Law That Should Be Settled By This Court

To the extent that the language of *Shaffer v. Heitner* suggests reference to the standards developed during the regime of *International Shoe Co. v. Washington* 326 U.S. 310

(1945), those standards have been met. Under the evidence presented to the California courts in this case, the exercise of personal jurisdiction over husband is both reasonable and just, and is consistent with traditional conceptions of "fair play and substantial justice." *International Shoe, supra* 326 U.S. at 316, 317 and 320.

Kulko v. California Superior Court 436 U.S. 84 (1977), which Petitioner has cited several times, involved factual circumstances very different from those in the present case. Significantly, as pointed out by Husband in his Petition (page 14), *Kulko* did not involve an issue of exercise of jurisdiction based upon the husband's physical presence in the forum state. Further, *Kulko* involved post-decree proceedings initiated by the wife to reopen the question of the amount of child support payments to be made by the husband, some three and a half years or so after there had been a final divorce decree which incorporated the terms of a separation agreement which had settled the amount to be paid by husband for child support. Under those facts it was held to be not reasonable to require the husband to litigate the support increase issues in California.

In the present case, there has not been a divorce decree settling any issues and the validity and enforceability of the purported settlement agreement executed by Husband and Wife is in dispute and has yet to be adjudicated by any court, although both the trial judge and the appellate judges in New Jersey have expressly questioned the fairness of Husband's conduct and of the agreement itself.

In the present case, each time Husband visited California he was there purposefully and more than just briefly. There is a connection between his presence in California (at several different times) and the litigation in which he was served with process during one of those visits. That Wife might initiate proceedings in California after she and the children became residents of that state and that she might have him served with process relating to those proceedings while he was present in California was reasonably foreseeable by Husband and was "not so unpredictable as to be unfairly burdensome." *Amusement Equipment Inc. v. Mordelt* (5th Cir.1985) 779 F. 2d 264, 270. See also *Worldwide Volkswagen Corp. v. Woodson* 444 U.S. 282, 297 (1980). Under the particular facts of the present case, the exercise of personal jurisdiction over Husband is both fair and reasonable, not oppressive or unjust.

The decisions of the state courts are consistent with the prior decisions of this Court and this case does not present a question of federal law that should be settled by this Court.

The Decision Of The California Court Of Appeal Is Not In Conflict With The Decision Of Any State Court Of Last Resort Or A Federal Court Of Appeals

This case does not present a circumstance in which the California Court of Appeal decision is in conflict with the decisions of other state or federal appellate courts. None of the cases cited by Husband in his Petition involve factual circumstances similar to those here, where the evidence shows a continuing pattern of recurring visits to California by Husband. For example, in *Harold M. Pitman Co. v. Typecraft Software* (N.D. Ill. 1986) 626

F.Supp. 305, Defendant O'Connor was served with process on the *one and only time* he was in the State of Illinois for a three-day exhibition. Similarly, in *Amusement Equipment Inc. v. Mordelt, supra,* the non-resident defendant (Mordelt) was present in Louisiana only briefly for a trade show. In *Nehemiah v. Athletics Congress of U.S.A.* (3d Cir.1985), 765 F.2d 42 the question was whether the brief presence of its agent constituted the "presence" of an unincorporated association sufficient to impose personal jurisdiction over the association, a somewhat different question than the one presented in the present case. In any event, it is clear from the Court of Appeal's opinion in *Nehemiah* that the presence involved was indeed transitory. *Bershaw v. Sarbacher* (Wash. App. 1985) 700 P. 2d 347 was a paternity case involving an allegation that the non-resident putative father had been fraudulently lured into the State of Washington for the purpose of serving him with process (see 700 P.2d at page 348). In discussing the fact of the defendant's presence in Washington at the time of service, the court expressly noted that his was a "transient presence". (See 700 P.2d at page 349). In any event, *Bershaw* is inapposite on the ground that the statutory basis asserted under the Washington long arm statute was "The commission of a tortious act within this state" (see 700 P.2d at page 349), whereas the statutory basis under the California statute in this case is the "presence" of the defendant within the state.

The fact that the California courts on the facts of the present case found in favor of the exercise of jurisdiction, whereas the courts in the foregoing cases determined on the basis of markedly different factual circumstances that the exercise of personal jurisdiction was not proper, does

not amount to a conflict of the sort contemplated by Rule 17.1(b) of the Rules of the United States Supreme Court. Clearly, the cases cited by Husband at pages 10 and 11 of his Petition involve fleeting or transitory presence and this case does not.

Moreover, regarding the public policy of encouraging parental visitation, that is a state concern, not a matter to be addressed by this Court. The California courts have held that the exercise of personal jurisdiction over Husband under the facts of this case does not interfere with that State's public policy of encouraging parental visitation.

Granting Of Husband's Petition Would Result In A Substantial And Unjust Delay

Wife has contended throughout this case that Husband's jurisdictional challenge has not been undertaken in good faith but, rather, has been calculated to bring Wife to her knees and force her not only to capitulate on the jurisdictional issue and litigate the marital issues in New Jersey but also to accept the terms of the purported settlement agreement which, as the New Jersey Courts observed, was not negotiated from equal bargaining positions and provided for an unequal distribution of marital assets in favor of Husband. The record in this case establishes that, for more than a full year, Husband withheld all child and spousal support payments from Wife even though the purported New Jersey settlement agreement he claims is binding provided for such payments and even after, in contempt proceedings, the California Superior Court ordered him to make such payments. Husband

finally resumed payments to Wife only after the California Superior Court conditioned the granting of his request for a stay pending his Petition for Writ of Certiorari to this Court on his doing so. Husband has confirmed these facts in his Petition (pages 17-19).

California's Exercise Of Personal Jurisdiction Under The Facts Of This Case Is Proper Based Upon A Consideration Of The Relative Burdens On And Interests Of Both Parties And The Interests Of The Forum State

In determining the validity of the exercise of personal jurisdiction over a non-resident, it is appropriate to consider not only the relative burden on the defendant but also the interests of the plaintiff and of the forum state. *Asahi Metal Industrial Co. vs. California Superior Court*, 480 U.S. 102 (1987). California has a legitimate interest in providing a forum for the adjudication of legal issues involving its residents (wife and children) as long as doing so does not offend traditional notions of fair play and substantial justice. Based upon the evidence in this case, Husband clearly has a higher level of mobility and has established a habit of travelling to California even prior to the initiation of the separation proceedings. It is substantially more convenient for him to travel to California for purposes of litigation than for Wife, who has the day-to-day custody and responsibility of the two small children, to travel regularly to New Jersey. Husband has acknowledged that he has reaped tax benefits from his ability to schedule business activities in California and he can continue to do so in connection with his future trips to California to visit his children and to appear in judicial proceedings. Wife, on the other hand, being a homemaker

and mother, does not have the same advantage. It would be most burdensome to require Wife with two small children to fly back and forth between California and New Jersey to litigate issues which can just as easily and without any substantial unfairness to Husband be litigated and adjudicated in the California courts. Contrary to the suggestion of Husband, there has been no forum shopping by Wife. She has initiated judicial proceedings in the state in which she and the children reside, after moving there with Husband's consent and active participation.

CONCLUSION

For all of the reasons set forth herein and based upon all of the foregoing authorities, it is respectfully requested that this Court deny Husband's Petition for Writ of Certiorari.

Dated: August 7, 1989

Respectfully Submitted,

ROBERT L. NELSON
JAMES O. DEVEREAUX
Counsel of Record for
Real Party in Interest,
Francie Burnham

APPENDIX I

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

DENNIS BURNHAM, Petitioner, v. SUPERIOR COURT, COUNTY OF MARIN, Respondent, FRANCIE BURNHAM, Real Party in Interest.	A044090 Marin County Superior Court No. FL1003 Filed APR -7 1989

BY THE COURT:

After full briefing and consideration of the issues raised therein, as well as the court's independent research, the petition for writ of mandate is denied. The court concludes that personal presence continues to be a valid jurisdictional predicate for *in personam* jurisdiction, and that *Shaffer v. Heitner* (1977) 433 U.S. 186 does not compel a contrary conclusion. As the trial court noted, no California or United States Supreme Court case has applied *Shaffer's* "minimum contacts" analysis to a defendant present in the forum state and personally served with process. Those cases which have considered the issue have ruled that *Shaffer* does not preclude a finding of personal jurisdiction based on presence. (See, e.g., *Amusement Equipment, Inc. v. Mordeldt* (5th Cir. 1985) 779

F.2d 264; *Aluminal Industries v. Newtown Commercial Assoc.* (S.D.N.Y. 1980) 89 F.R.D. 326; *Cariaga v. District Court* (Nev. 1988) 762 P.2d 886; *Oxmans' Erwin Meat Co. v. Blacketer* (Wis. 1979) 273 N.W.2d 285; see also *Donald Manter Co., Inc. v. Davis* (1st Cir. 1976) 543 F.2d 419.)

In light of the evidence presented to the trial court that petitioner's presence within California was for the dual purposes of visitation and conducting business activities, the imposition of personal jurisdiction in this case will not act to discourage parental visitation. (Cf. *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 45.)

Dated APR - 7 1989

King, J.

ACTING P.J.

APPENDIX II

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1522-88T2
A-5705-87T2

DENNIS BURNHAM,

Plaintiff-Appellant,

v.

FRANCIE BURNHAM,

Defendant-Respondent.

ORIGINAL FILED
JUL 24 1989

Argued June 6, 1989 - Decided July 24, 1989

Before Judges Antell and Brochin.

On appeal from Superior Court, Chancery Division, Family Part, Sussex County.

Laurence J. Cutler argued the cause for appellant (Cutler & Celli, attorneys; Mr. Cutler, on the brief).

Ann O'Flanagan argued the cause for respondent.

PER CURIAM

Following execution by the parties of a property settlement agreement on July 8, 1987, defendant wife moved to California with the two children of the marriage. The move was made with the acquiescence of plaintiff husband who, in fact, paid for the cost of transportation. Plaintiff filed his complaint for divorce in New Jersey on October 7, 1987, but did not serve defendant with process

at this time. Defendant started suit in California against plaintiff for legal separation, custody and child support on January 5, 1988, and plaintiff was served by mail with the papers in that case on January 24, 1988. He was also personally served while on a business trip in that state.

After being served with the California suit papers, plaintiff, for the first time, made extraterritorial service on defendant of his New Jersey summons and complaint on January 30, 1988.

Plaintiff here appeals from an order dated June 3, 1988, dismissing the complaint which he filed in New Jersey on October 7, 1987. He also appeals from an order dated October 14, 1988, dismissing his second complaint for divorce and incorporation of the property settlement agreement, which he filed after the dismissal of his first complaint. We have consolidated both appeals for the purpose of review.

The determination of the Chancery Division to foreclose plaintiff from pursuing his claim for relief in New Jersey was grounded in the belief that plaintiff had deliberately and unfairly manipulated defendant into moving to California so that he could bring his divorce action in New Jersey where it would be the most convenient for him and most inconvenient for defendant, upon the fact that plaintiff failed to issue his summons within ten days after filing the complaint as required by R. 4:37-2(a), upon considerations arising from the Uniform Child Custody Jurisdiction Act, *N.J.S.A.* 2A:34-35, and upon considerations of *forum non conveniens*.

We affirm both orders under review substantially for the reasons stated by Judge Graves for the Chancery

Division, Family Part, in his detailed and comprehensive statement of reasons filed with the order of June 3, 1988.

Supreme Court, U.S.
FILED
NOV 15 1989
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-44

In The

Supreme Court of the United States

October Term, 1989

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT, COUNTY OF MARIN,

Respondent.

FRANCIE BURNHAM,

Real Party in Interest.

On Writ Of Certiorari
To The California Court Of Appeal
First Appellate District, Division Five

JOINT APPENDIX

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Petition For Certiorari Filed July 12, 1989
Certiorari Granted October 2, 1989

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES[1]

Docket No.

1. January 5, 1988 – Petition For Legal Separation.
2. February 4, 1988 – Original Summons And Proof Of Service.
3. April 12, 1988 – Husband's Notice Of Motion To Quash Service Of Summons/Dismiss The Action.
4. April 12, 1988 – Declaration Of Husband In Support Of Motion To Quash Service/Dismiss Action.
5. April 12, 1988 – Husband's Memorandum Of Points And Authorities In Support Of His Motion To Quash Service Of Summons/Dismissal Of The Action.
6. June 23, 1988 – Declaration Of Wife In Opposition To Motion To Quash Service Of Summons.
7. June 23, 1988 – Declaration Of Tracy R. Kirkham In Response To Motion To Quash Service Of Summons.
8. June 23, 1988 – Wife's Memorandum Of Points And Authorities In Opposition To Husband's Motion To Quash Service Of Summons.
9. June 27, 1988 – Husband's Reply In Support Of His Motion To Quash Service Of Summons/Dismiss Action.

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[1] In the superior court Francie Burnham was the petitioner and Dennis Burnham was the respondent. Since Dennis Burnham is the petitioner in this court, to avoid confusion the documents will refer to "husband" and "wife."

10. June 30, 1988 – Hearing On Husband's Motion To Quash.

11. September 8, 1988 – Findings And Order After Hearing On Motion To Quash Service Of Summons/Dismiss The Action.

12. September 16, 1988 – Wife's Memorandum Of Points And Authorities In Support Of Motion For Reconsideration.

13. September 16, 1988 – Wife's Notice of Motion For Reconsideration Re Order Entered 9/8/88.

14. September 28, 1988 – Verification By Dennis Burnham Of Husband's Reply In Support Of His Motion To Quash Service Of Summons/Dismiss Action.

15. September 28, 1988 – Declaration Of Dennis Burnham In Support Of Husband's Response To Wife's Motion Re Reconsideration.

16. September 28, 1988 – Husband's Memorandum Of Points And Authorities In Opposition To Wife's Motion Re Reconsideration.

17. September 30, 1988 – Hearing On Wife's Motion For Reconsideration.

18. October 5, 1988 – Order Granting Motion For Reconsideration, Vacating September 8 Order, And Denying Motion To Quash.

19. October 13, 1988 – Declaration Of Cecilia D. Lannon In Support Of Ex Parte Request For An Order Vacating The Order Granting Motion For Reconsideration.

20. October 13, 1988 – Husband's Counsel's Declaration And Points And Authorities In Support Of Husband's Motion For Reconsideration/Clarification.

21. October 13, 1988 – Husband's Notice of Motion For Reconsideration/Clarification.

22. October 24, 1988 – Declaration Of Francie Burnham In Opposition To Husband's Motion For Reconsideration/Clarification.

23. October 24, 1988 – Declaration Of Robert L. Nelson In Opposition To Husband's Motion For Reconsideration/Clarification.

24. October 24, 1988 – Wife's Memorandum Of Points And Authorities In Opposition To Husband's Motion For Reconsideration/Clarification.

25. October 24, 1988 – Wife's Responsive Declaration To Husband's Motion For Reconsideration/Clarification.

26. October 27, 1988 – Husband's Reply In Support Of His Motion For Reconsideration/Clarification.

27. October 27, 1988 – Husband's Memorandum Of Points And Authorities In Reply To Wife's Opposition To Husband's Motion For Reconsideration/Clarification.

28. October 31, 1988 – Hearing On Husband's Motion To Reconsider

29. November 4, 1988 – Order Denying Husband's Motion To Reconsider.

30. April 7, 1989 – Decision From The Court Of Appeal Denying Husband's Petition For Writ Of Mandate.

31. June 30, 1989 – Superior Court Minute Order Staying All Proceedings Which Involve In Personam Jurisdiction.

(Filed Jan. 5, 1988)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MARIN

MARRIAGE OF

PETITIONER: FRANCIE BURNHAM

RESPONDENT: DENNIS BURNHAM

PETITION FOR
[X] Legal Separation

CASE NUMBER 1003

2. STATISTICAL FACTS

a. Date of marriage 3-7-76

b. Date of separation: 7-14-87

c. Period between marriage and separation
Years: 11 Months: 4

3. DECLARATION REGARDING MINOR CHILDREN OF THIS MARRIAGE

b. [X] The minor children are:

Name	Birthdate	Age	Sex
Rachel Marie Burnham	10-30-79	8	F
Ari Benjamin Burnham	8-11-85	2	M

* * *

5. DECLARATION REGARDING COMMUNITY AND QUASI-COMMUNITY ASSETS AND OBLIGATIONS AS PRESENTLY KNOWN

b. [ ] All such assets and obligations have been disposed of by written agreement.

d. [X] All such assets and obligations are listed below:

The exact nature and extent and description of the community and quasi-community assets and obligations are currently unknown to the Petitioner. Petitioner will seek leave of this Court to amend this Petition when the same is known to her.

6. Petitioner requests

b. [X] Legal separation of the parties based on (1) [X] Irreconcilable differences. CC 4506(1)

7. Petitioner requests that the court grant the relief or judgment specified in item 6, make injunctive and other orders as may be proper, and that

a. [X] Child custody be awarded
(1) Legal custody
(b) [X] Sole to [X] petitioner

(2) Physical custody
(b) [X] Sole to [X] petitioner

b. [ ] Child visitation rights be granted (*specify*):

c. [X] Child support be awarded [X] petitioner

d. [X] Spousal support be awarded [X] petitioner

e. [X] Property rights be determined.

f. [X] Attorney's fees and costs be awarded [X] petitioner

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration is executed on
(date): January 5, 1988

/s/ Francie Burnham
FRANCIE BURNHAM

PROOF OF SERVICE

(Filed FEB. 4, 1988)

1. I served the Summons (Family Law) and Petition (Family Law) on respondent (name): Dennis Burnham

* * *

c. [X] By delivery at [X] home
(1) Date of: January 24, 1988
(2) Time of: 1:25 p.m.
(3) Address: 100 Lovell Avenue
Mill Valley, California

2. Manner of service: (Check proper box)

a. [X] Personal service. By personally delivering copies to the person served. (CCP 415.10)

3. The notice to the person served (item 2 on the copy of the summons served) was completed as follows (CCP 412.30, 415.10, and 474):

a. [X] As an individual

c. [X] By personal delivery on (Date): January 24, 1988

4. At the time of service I was at least 18 years of age and not a party to this action.

6. Person serving

Tracy Kirkham
Hennigan & Mercer
611 West Sixth St., Los Angeles, CA 90017

I declare under penalty of perjury that the foregoing is true and correct and

that this declaration is executed on (date): January 27, 1988 at (place): Los Angeles, California.

/s/ Tracy R. Kirkham
(signature)
TRACY KIRKHAM

(Filed APR. 12, 1988)

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MARIN

PETITIONER: FRANCIE BURNHAM

RESPONDENT: DENNIS BURNHAM

NOTICE OF MOTION
[X] Other (specify): TO QUASH SERVICE OF SUMMONS/DISMISS THE ACTION

CASE NUMBER 1003

1. TO (*name*): FRANCIE BURNHAM and her attorney of record ROBERT NELSON

2. A hearing on this motion for the relief requested in the attached application will be held as follows:

a. date: May 5, 1988 time: 9:00 a.m. in dept: 1 rm.:

3. Supporting attachments
d. [X] Points and authorities

Date: April 11, 1988

/s/ Cecilia D. Lannon
(Signature)
CECILIA D. LANNON

FILED
APR 12 1988

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MARIN

In Re: Marriage of	CASE NO. 1003
Petitioner: FRANCIE BURNHAM and Respondent: DENNIS BURNHAM	(Excerpts From) DECLARATION OF RESPONDENT DENNIS BURNHAM IN SUPPORT OF RESPONDENT'S MOTION TO QUASH SERVICE/ DISMISS ACTION

I, DENNIS BURNHAM, declare:

1. That I make this declaration, appearing specially with my attorney of record, in the above referenced matter.

2. That my declaration is filed in support of my motion to quash service of summons in within action, for lack of personal jurisdiction over me, or in the alternative to dismiss said action, pursuant to California Code of Civil Procedure § 418.10 and California Rules of Court § 1234.

* * *

5. My motion is based upon the following facts:

A. Petitioner and Respondent were married on March 7, 1976. During 1976 they purchased land in Hopatcong, New Jersey, upon which they built the home that was their family residence. The parties have lived in New Jersey as residents and domiciliaries of that state since August of 1977. The parties' two children (RACHEL, dob

10/30/79, and ARI, dob 8/11/85) were born in New Jersey and the oldest one, Rachel, has attended school there. Respondent business has its principal office in New Jersey, where his office is located. Virtually all of the parties' family and friends reside in New Jersey. At all times since August, 1977 Respondent has been a resident and domiciliary of New Jersey were he continues to own property, conducts and manage his business, votes, has his New Jersey driver's license, maintains bank accounts, files tax returns, and registers his vehicles, etc. He intends to continue to live in New Jersey permanently, and to maintain his extensive contacts with New Jersey as he always has.

B. On July 8, 1987, Petitioner and Respondent signed a Property Settlement Agreement (attached hereto as Exhibit A) disposing of our real and personal property (marital as well as my separate property), specifying the payment by me of child support and spousal support, allocating responsibility for indebtedness, taxes, etc. This Property Settlement Agreement resolved all of the pending issues between Petitioner and Respondent.

* * *

C. The Agreement recites that all of its terms are to be construed and interpreted according to the laws of New Jersey (page 13). Furthermore, in the event of a dispute regarding custody and visitation, the parties agreed, and the Agreement so recites, that this issue will be submitted to the New Jersey Court for resolution (page two).

* * *

E. Respondent, DENNIS BURNHAM, has no contacts with the State of California which would justify

the exercise of *any* personal jurisdiction over him: Respondent has never been a resident of California and never been a domiciliary there; Respondent has never owned real or personal property in the State of California; never owned or maintained bank accounts or deposits of any kind in the state of California; never had a California driver's license or registered a vehicle in California; never voted in California; never paid taxes of any kind, whatsoever, in California. There is no marital or community property in California. In fact, the marriage itself, and the parties thereto, never had any contact whatsoever with the State of California. All of the marital contact and marital property, as well as rights and obligation, have their nexus with the State of New Jersey; all records incident to the parties' rights and obligations, as well as property, are located there; counsel for each party to the Property Settlement Agreement, as well as to the present New Jersey action reside in New Jersey. The Agreement specifies that New Jersey law is to control in its construction and interpretation, and that the New Jersey Courts are to continue to have jurisdiction exclusively to resolve disputes regarding custody and visitation.

F. * * * Petitioner's attorney, Tracy Kirkham, served Respondent with the California legal separation Petition when he arrived at Petitioner's house to exercise visitation with his children, Ari and Rachel. Were it not for Respondent's strong desire to continue to see his children and to have frequent and on-going contact with them, he would not have been served in California.

* * *

Respondent, therefore, requests the Court to grant his motion and quash service of summons upon him and dismiss the action based on the facts specified above, as well as the applicable law set forth more particularly in Respondent's Points and Authorities filed concurrently with this motion.

Dated: 8 April 1988

/s/ Dennis Burnham
DENNIS BURNHAM,
Respondent

FILED
JUN 23 1988

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF MARIN

No. FL1003

In re the Marriage of

Petitioner: FRANCIE BURNHAM

Respondent:DENNIS BURNHAM

(Excerpts From) DECLARATION OF PETITIONER FRANCIE BURNHAM IN OPPOSITION TO MOTION TO QUASH SERVICE OF SUMMONS.

I, FRANCIE BURNHAM, declare:

1. I am the Petitioner in the above-referenced matter.

2. The attached document entitled "Affidavit of Francie C. Burnham" executed May 17, 1988 is a true and correct copy of the original Affidavit signed and sworn by me on May 17, 1988 and submitted to the Superior Court of New Jersey on or about May 18, 1988, in connection with an action entitled *Burnham v. Burnham*, Docket No. 8896-88, which was then pending before the Chancery Division, Family Part, Sussex County.

3. I hereby incorporate all statements made in said Affidavit herein as if fully set forth in this Declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and

correct and that this declaration was executed on June 23, 1988.

/s/ Francie Burnham
FRANCIE BURNHAM

ANN O'FLANAGAN & ASSOCIATES
1451 Route 46
Suite 208
Ledgewood, NJ 07852
Telephone: (201) 584-8868

DENNIS BURNHAM, Plaintiff -vs- FRANCIE BURNHAM, Defendant	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION FAMILY PART: SUSSEX COUNTY DOCKET NO. 8896-88 (Excerpts From) AFFIDAVIT OF FRANCIE C. BURNHAM (Executed May 17, 1988)

I, FRANCIE C. BURNHAM, first being duly sworn deposes and states:

1. I am the defendant in the proceeding presently before the Superior Court, for the County of Sussex, State of New Jersey. I am currently residing in the County of Marin, State of California. I make this affidavit from my own knowledge and if called, could and would competently testify to the following facts.

* * *

12. At our April 8 session I told Dennis that I had decided finally that I wanted a divorce and to relocate with the children in California. We discussed the fact that there seemed to be no alternative to this solution, other

than extended therapy, which neither of us was inclined to persue. Dennis agreed that he would assist me in moving to the San Francisco Bay Area.

* * *

48. Dennis's initial visitation with Rachel occurred on the weekend of October 23-25, 1987. They went to the Napa Valley on Friday where Dennis had business (Rachel attended one of the meetings) and had a Saturday morning hot-air balloon ride with a business associate of Dennis's. They returned Sunday. Dennis seemed pleased with the visit.

49. The next visitation, Friday, October 30, 1987, was Rachel's birthday, and Dennis attended the birthday party after having spent the day doing business in the San Francisco area.

50. Their third visitation occured on December 6, 1987, when Dennis took Rachel for the day to the "Lawrence Hall of Science" and for a drive to Napa (about fifty miles from the Bay Area) to pick up some business things Dennis had left there during the weekend in October.

51. In mid-December, I received a letter from Dennis delineating his business and visitation schedules for the upcoming eight months. (See Exhibit "H" hereto.)

* * *

53. On January 18, 1988, around 6:00 p.m. I received a call from Dennis, who was in Los Angeles on business. He told me that he had received a call from his office in New Jersey informing him that his partner, Richard Danziger, had accepted California court papers on his behalf.

* * *

54. Dennis arrived on January 21, 1988, and took the children to the park. The next day, he returned after doing business to take Rachel with him for a weekend in San Francisco. He brought her home on Sunday morning, January 24, 1988. He then spent time at the playground with Ari, and when he was preparing to leave, Tracy, who was visiting, handed Dennis a copy of the California summons.

* * *

56. Dennis arrived April 1, 1988 for his fifth visitation weekend, picking Rachel up on Friday afternoon, and after spending time with both children at Old Mill Park, he and Rachel went into the City to spend the night. Rachel and Dennis returned Saturday morning to take Ari with them for a day at the San Francisco Zoo. They returned Ari Saturday evening, and Rachel again spent the night with her father. Dennis returned Rachel on Sunday, April 3, 1988.

57. Dennis's sixth, and most recent visitation weekend occurred in connection with the "GGASA Showcase of Ideas" convention (April 22, 23, & 24, 1988) held in Monterey, California, about 50 miles south of San Francisco. Dennis arrived on the afternoon of April 22, met Rachel at school, and after visit with her class, flew her (I thought they were driving) to Monterey. His sister, Jackie, and her two-year-old daughter, Michelle, were there. The next day while Dennis did business, Jackie, Michelle and Rachel visited the Monterey Aquarium. That evening

Dennis took Rachel to a trade show dinner at the aquarium. They returned via "Great America" amusement park on Sunday.

* * *

Further, affiant sayeth not.

Dated: May 17, 1988

/s/ Francie C. Burnham
Francie C. Burnham

CASE NUMBER: FL 1003
Filed Sep. 8, 1988

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF MARIN

PETITIONER: FRANCIE BURNHAM
RESPONDENT: DENNIS BURNHAM

FINDINGS AND ORDER AFTER HEARING

* * *

Motion to Quash Service of Summons/Dismiss the Action

This proceeding was heard as follows:

1. Date: 6-30-88
   Dept: 6
   Judge: Richard H. Breiner
   Attorney present in court: Robert L. Nelson
   Attorney present in court: Cecilia D. Lannon

* * *

On the Motion filed 4-12-88

By: Respondent Dennis Burnham

2. Evidence was presented and the matter was submitted.

* * *

19. Respondent's Motion to Quash Service of Summons and to Dismiss is denied, since the Court finds that it has jurisdiction over the marital status, and therefore summons cannot be quashed. However, the

court finds that it has no personal jurisdiction over respondent over any other issue except for marital status.

Date: September 8, 1988

/s/ Richard H. Breiner
JUDGE OF THE SUPERIOR COURT

* * *

FILED Sep. 28, 1988

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN

In Re: Marriage of Petitioner: FRANCIE BURNHAM AND Respondent: DENNIS BURNHAM	CASE NO. FL 1003 (Excerpts From) DECLARATION OF DENNIS BURNHAM IN SUPPORT OF RESPONDENT'S RESPONSE TO PETITIONER'S MOTION RE RECONSIDERATION

I, DENNIS BURNHAM, declare:

1. I am the Respondent in this matter and continue to appear specially by and through my attorney of record, CECILIA D. LANNON.

2. I make this statement with regard to the motion filed on behalf of Petitioner, FRANCIE BURNHAM, for reconsideration of the order filed September 8, 1988 with regard to Respondent's motion to quash service of summons and to dismiss.

* * *

5. * * * This declaration in response to said motion will be directed at the implication contained in Petitioner's Memorandum of Points and Authorities that I have had "a regular pattern of visits to California", and that these visits have been for any purpose other than visitation. As can be seen by the chronology set forth below, there is no regular pattern of visitation since Petitioner, Francie, has continually interfered with my visitation with my two children, RACHEL age 9, and ARI age

3. I never have had any personal or business reason to travel to California other than to visit with my children. The following chronology, set forth in paragraph 7 below, details my visitation.

6. With regard to my business, I am Chairman of the board of Roburn International Corp. (my own business), a New Jersey corporation, with offices and facilities in New Jersey and nowhere else. As stated in my declaration in support of my original motion to quash service of summons and dismiss, I have no business license to do business in California, I pay no sales tax in California, I have never filed an income tax return in California, I have no business address in California, I do not have a California license, and, in fact, have absolutely no contacts whatsoever with California, with the exception of coming here to visit my children.

7. * * * In December, there was a national sales meeting in Las Vegas, Nevada, held by one of our Minnesota customers. I attended the event in Nevada so that I could squeeze in a brief Sunday visit with my children in California before returning home on an overnight flight. The business was conducted in Nevada, not in California.

* * *

In January, Francie permitted me to take Rachel on a weekend trip to downtown San Francisco on January 23-24. Again, she denied my visitation with Ari. I brought Rachel home, as promised, on Sunday, January 24. At that time Tracy Kirkham served me with the summons and petition for legal separation, that is the subject of these

proceedings. I was served in Francie's home in Mill Valley, specifically at the conclusion of my visitation with Rachel.

* * *

I declare under penalty of perjury the above is true and correct. Executed this 28th day of September, 1988, at Elmwood Park New Jersey 07407.

/s/ Dennis Burnham
DENNIS BURNHAM, Respondent

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF MARIN

In re the Marriage of Petitioner: FRANCIE BURNHAM and Respondent: DENNIS BURNHAM	No. FL 1003 ORDER GRANTING MOTION FOR RECONSIDERATION, VACATING SEPTEMBER 8 ORDER AND DENYING MOTION TO QUASH Filed Oct. 5, 1988

Having heard petitioner's motion to reconsider and reviewing the entire file, including particularly the order of the New Jersey Superior Court refusing to exercise jurisdiction and the statement of reasons set forth in the June 3, 1988 order of that Court, and for good cause,

IT IS HEREBY ORDERED:

1. That petitioner's motion for reconsideration is granted.
2. That on reconsideration, this Court's Order filed September 8, 1988 is vacated.
3. That respondent's motion to quash is denied in its entirety.
4. That the court finds, based on the evidence submitted, that it has jurisdiction, both *in rem* and *in personam*, over the subject matter and the parties, respectively.

DATED: OCTOBER 5, 1988

/s/ Richard H. Breiner
RICHARD H. BREINER
Judge of the Superior Court

Filed October 24, 1988

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF MARIN

In re the Marriage of Petitioner: FRANCIE BURNHAM Respondent: DENNIS BURNHAM	No. FL 1003 (Excerpts From) DECLARATION OF FRANCIE BURNHAM IN OPPOSITION TO RESPONDENT'S MOTION FOR RECONSIDERATION/ CLARIFICATION

I, FRANCIE BURNHAM, hereby declare that:

1. I am the Petitioner in the above-entitled matter and I make this declaration as part of my response to Respondent's motion for reconsideration/clarification which is to be heard in this Court on October 31, 1988.

* * *

4. I was amazed to read Dennis Burnham's statement (Declaration of Dennis Burnham in Support of Respondent's Response to Petitioner's Motion Re Reconsideration, page 3) that, "I have never had any personal or business reason to travel to California other than to visit with my children." That statement is absolutely false. For example, by letter dated December 12, 1987, and written in his own hand (a copy of which is attached hereto as Exhibit A) Dennis Burnham told me that on April 21 through 24, 1988, he would " . . . be in the Bay Area on business." The truth is that Dennis did come to the Bay Area on those dates to attend the GGASA Showcase of Ideas convention held in Monterey. Dennis took

our daughter, Rachel, to Monterey with him and after their return Dennis told me that while he had attended to business Rachel had visited the Monterey Aquarium with her Aunt Jackie (Dennis' sister), and her Cousin, Michelle, and that he had taken Rachel and a business friend, Jim Coyle, to a trade show dinner at the Aquarium in connection with the convention. When Rachel returned home after the weekend she brought several specialty advertising items including an imprinted balloon. Also, on the weekend of October 24, 1987, when Dennis took Rachel with him to the Napa Valley he told me that he was conducting a business seminar that weekend on speciality advertising, a seminar which Rachel attended as she spent the weekend with him in Napa. As a matter of fact, Dennis attended at least one business presentation or seminar in California every year during our marriage, except for 1984. Dennis apparently spent the entire week following the October 24, 1987, Napa seminar in California as he attended Rachel's eighth birthday party on the weekend of October 31, 1987. After the birthday party Dennis told us that he was flying down to the Los Angeles area to visit with his sister, Jackie, and her family.

5. It is interesting that Dennis was quite explicit (page 5 of his September 28, 1988 Declaration) regarding the business meeting he attended in Las Vegas in December of 1987 but he lacks a similar explicitness in the very next paragraph regarding his January 1988 visit to California. In the evening of January 18, 1988, Dennis telephoned me and said that he was in Los Angeles on business and that he intended to come to the Bay Area in a couple of days to visit the children. In fact, Dennis

arrived in Mill Valley on January 21, 1988, and took the children to the park. The next day when he came to take Rachel for the weekend, he mentioned that he had been attending to some business in San Francisco.

6. The foregoing examples are by no means a complete rendition of all of Dennis Burnham's personal and/or business activities in the State of California. If called upon to do so I could and would testify competently to the specifics of numerous trips to California by Dennis, on some of which I accompanied him during the last ten years. I believe, however, that these examples do serve to show the falsity of the statements made in his declaration.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: October 24, 1988.

/s/ Francie Burnham
FRANCIE BURNHAM

Filed Oct. 27, 1988

SUPERIOR COURT OF CALIFORNIA, COUNTY OF MARIN

In Re: Marriage of	CASE NO. FL 1003 (Excerpts From) RESPONDENT'S REPLY IN SUPPORT OF HIS MOTION FOR RECONSIDERATION/ CLARIFICATION OF THE OCTOBER 5, 1988 ORDER RE JURISDICTION
Petitioner: FRANCIE BURNHAM	
and	
Respondent: DENNIS BURNHAM	

I, Dennis Burnham declare that:

1. I am the Respondent appearing specially in the above entitled matter and I make this declaration in reply to the response filed herein on behalf of Petitioner to my Motion for Reconsideration/Clarification of the October 5, 1988, Order re Jurisdiction filed herein.

2. This Reply Declaration is directed toward the points raised in the declaration of Petitioner Francie Burnham filed in support of her response to my motion.

* * *

4. Petitioner, Francie Burnham's, declaration regarding Respondent's "contacts" with the State of California is false. Petitioner knows that Respondent has, since she removed the children to California, always attempted to schedule some California "business" around times when he wants to be with the children. For example, at school open house, summer vacation, birthdays, etc. He does this to take advantage of whatever tax

benefits remain under the tax laws. The "business" he conducts consists of *attendance* at trade shows – very similar to attorneys who attend conferences in other states. He is able to write off, for tax purposes, a part of his trip for "business", but he is participating in and attending trade shows. This does not constitute "doing business" and does not amount to constitutionally sufficient contacts which would subject him to *in personam* jurisdiction in California. Petitioner's declaration is false in that it asserts and attempts to imply that Respondent was conducting business in California, and that rather than visitation was his purpose. This is untrue. Petitioner's allegation that she accompanied him on business trips is also false. She has refused to travel anywhere with him for business or pleasure since the birth of their children over 9 years ago. She has absolutely no information about Respondent's alleged business trips.

In addition, Respondent has family in Southern California, and, has travelled to Southern California to visit his relatives who moved here *after* the parties' separation. Again, the purpose of the visit, as have all of his trips to California been, was to visit his children and his family. He would, of course, schedule attendance at trade shows, lectures, etc. to take advantage of tax write-offs.

* * *

5. Petitioner's allegation that she knows more about Respondent's business than her declaration recites is false. If called upon to testify, Respondent would testify confidently and truthfully to the specifics of his contacts in the State of California, to the fact that trips to California have always been for the purpose of visiting his children who have been removed from the State of New

Jersey by Petitioner. He has been fortunate to be able, on some occasions, to schedule attendance at trade shows, etc., in order to defray part of the extraordinary expense visitation with his children necessitates.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 27 day of October, 1988, at San Rafael, California.

/s/ Dennis Burnham,
DENNIS BURNHAM, Respondent

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF MARIN

In Re: Marriage of	) No 1003
Petitioner: FRANCIE BURNHAM	) ORDER DENYING MOTION TO RECONSIDER AND CLARIFY
and	)
Respondent: DENNIS BURNHAM	) Filed Nov. 4, 1988

I have reviewed the authorities cited at the time of argument and find no valid reason to modify my October 5 order.

Accordingly, respondent's motion to reconsider and to clarify is denied.

DATED: November 4, 1988

/s/ Richard H. Breiner
Richard H. Breiner
Judge of the Superior Court

COURT OF APPEAL OF THE STATE OF CALIFORNIA
IN AND FOR THE
FIRST APPELLATE DISTRICT
DIVISION FIVE

DENNIS BURNHAM, Petitioner, v. SUPERIOR COURT, COUNTY OF MARIN, Respondent, FRANCIE BURNHAM, Real Party in Interest.	A044090 Marin County Superior Court No. FL1003 Filed APR -7 1989

BY THE COURT:

After full briefing and consideration of the issues raised therein, as well as the court's independent research, the petition for writ of mandate is denied. The court concludes that personal presence continues to be a valid jurisdictional predicate for *in personam* jurisdiction, and that *Shaffer v. Heitner* (1977) 433 U.S. 186 does not compel a contrary conclusion. As the trial court noted, no California or United States Supreme Court case has applied *Shaffer's* "minimum contacts" analysis to a defendant present in the forum state and personally served with process. Those cases which have considered the issue have ruled that *Shaffer* does not preclude a finding of personal jurisdiction based on presence. (See, e.g., *Amusement Equipment, Inc. v. Mordeldt* (5th Cir. 1985) 779 F.2d 264; *Aluminal Industries v. Newtown Commercial Assoc.* (S.D.N.Y. 1980) 89 F.R.D. 326; *Cariaga v. District Court*

(Nev. 1988) 762 P.2d 886; *Oxmans' Erwin Meat Co. v. Blacketer* (Wis. 1979) 273 N.W.2d 285; see also *Donald Manter Co., Inc. v. Davis* (1st Cir. 1976) 543 F.2d 419.)

In light of the evidence presented to the trial court that petitioner's presence within California was for the dual purposes of visitation and conducting business activities, the imposition of personal jurisdiction in this case will not act to discourage parental visitation. (Cf. *Judd v. Superior Court* (1976) 60 Cal.App.3d 38, 45.)

Dated APR - 7 1989

King, J.

ACTING
P.J.

Supreme Court, U.S.
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No. 89-44

In The

Supreme Court of the United States

October Term, 1989

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent,

FRANCIE BURNHAM,

Real Party in Interest.

On Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

PETITIONER'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Is service of process on a non-resident, while he is physically present in the forum state to visit his children, a sufficient basis by itself for the exercise of personal jurisdiction?

Traditionally, physical presence in a state was sufficient to confer personal jurisdiction over the defendant, if he was served while in the state. The question presented is whether that rule is still viable, in light of *Shaffer v. Heitner*, 433 U.S. 186 (1977), and related developments.

LIST AND DESIGNATION OF PARTIES

Francie Burnham began this action by filing a petition for legal separation in the California Superior Court. She was called the Petitioner, and Dennis Burnham was called the Respondent. Dennis Burnham then filed a petition for a writ of mandate in the California Court of Appeal. In that action, he was called the Petitioner and Francie Burnham was called the Real Party In Interest. Dennis Burnham is now the Petitioner in this court. To avoid any confusion, Dennis Burnham will be referred to as "Husband" and Francie Burnham as "Wife."

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No. 89-44

In The

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**On Writ Of Certiorari To The
California Court Of Appeal,
First Appellate District, Division Five**

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The trial court's original ruling was that California did not have personal jurisdiction over Husband. (JA 21-22.) It reconsidered that order, decided that personal jurisdiction existed, and denied Husband's motion to quash service. (JA 26.) The California Court of Appeal, First Appellate District, Division Five, upheld the trial court in an unpublished decision. (JA 34-35.)The California Supreme Court denied review. (Pet. App. D.)

JURISDICTION

The California Supreme Court denied Husband's petition for review on June 8, 1989. The California Court of Appeal decision is a final determination on the federal constitutional issue because it determined that California has personal jurisdiction over Husband. Under California law, Husband has no choice but to suffer a default judgment, or to enter a general appearance and defend on the merits, thus waiving his right to contest jurisdiction. *McCorkle v. City of Los Angeles*, 70 Cal.2d 252, 258, 449 P.2d 453, 74 Cal.Rptr. 389 (1969). Such a ruling is final for the purpose of this Court's jurisdiction. *Shaffer v. Heitner*, 433 U.S. 186, 195 n. 12 (1977). Jurisdiction of this Court rests upon 28 U.S.C. § 1257(3). *Kulko v. California Superior Court*, 436 U.S. 84, 90 n. 4 (1978).

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

Husband and Wife married in 1976, and moved to New Jersey in 1977. (JA 5, 11.) Their two children were born in New Jersey, and the family lived there together, until the parties had marital difficulties and separated in 1987. (JA 5, 11-12.)

On July 8, 1987, Husband and Wife entered into a written marital settlement agreement in New Jersey. (JA 12, Doc. #4, Ex. A.) It disposed of all the issues which normally arise when a marriage is dissolved. (*Ibid.*) In particular, it provided for a division of marital property, alimony, custody of the children to Wife, reasonable and liberal visitation to Husband, and child support. (*Ibid.*)

[1] References to material that is not in the Joint Appendix will be designated as "Doc." This refers to the docket number of the document which Husband assigned to the pleadings as they appear chronologically in the California Superior Court file. The Chronological List of Relevant Docket Entries appears in the Joint Appendix on p. 1.

The agreement was to be construed and interpreted in accordance with New Jersey law. (JA 12, Doc. #4, Ex. A, p. 13, ¶21.) In the event that the parties could not agree on the specifics of visitation, the issue was to be submitted to the court in New Jersey. (JA 12, Doc. #4, Ex. A, p. 2, ¶1.)

When the parties separated, Wife wanted to move to California with the children. (JA 17, Doc. #6, Attachment p. 4, ¶9:24-27.) Husband insisted that they reach a complete agreement, before he would refrain from opposing Wife's desire to take their children to California. (Doc. #6, Attachment, p. 10, ¶ 20:19-23.) The marital settlement agreement provided that Husband would pay the relocation expenses for Wife and the children. (Doc. #4, Ex. A, p. 10, ¶12.) Shortly after executing the agreement, Wife moved to California with the children on July 14, 1987. (Doc. #6, Attachment, p. 23, ¶42.)

Husband continued to live in New Jersey. (JA 11.) On October 21, 1987, he filed an action for divorce in New Jersey. (Doc. #4, p. 3:19-22 and Ex. C.) He requested that the court dissolve the marriage and incorporate the parties' written agreement. (Doc. #4, Ex. C, p. 2.) At Wife's request, he did not serve her immediately. (Doc. #6, Attachment, Ex. "P".)

On January 5, 1988, Wife filed an action for legal separation in California. (JA 5.) The form used for this purpose requires the completion of a declaration concerning marital property. (JA 6, ¶5.) Wife did not check the box which would have stated that the parties' marital assets had been disposed of by agreement. (JA 6, Item 5b.) Instead, Wife requested the California court to determine the parties' marital property rights. (JA 6, Items 5d and 7e.) Wife's petition also requested the California court to set the amounts of child support, spousal support, and attorneys fees. (JA 6, Items 7c, 7d, 7f.) She requested the California court to award her sole custody of the children. (JA 6, Item 7a.) She did not request it to make any provision enabling Husband to exercise visitation rights. (JA 6, Item 7b.)

On January 24, 1988, Husband was personally served with Wife's action, when he was at Wife's home in California to see the children. (JA 7-8, 13, 25.) At that time, the children were ages 2 and 8. (JA 5.)

On April 12, 1988, Husband made a special appearance and filed a motion to quash service of summons, on the ground that California did not have personal jurisdiction over him because he lacked sufficient contacts with the state to satisfy due process. (JA 10.) New Jersey is where Husband works, votes, files state income tax returns, has a drivers license, registers his vehicles, and maintains all of his bank accounts and his business. (JA 12.) Husband has never been a resident or domiciliary of California. (JA 12, 13.) He has never voted in California and has never paid California state income tax. (JA 13.) He has never owned any real property or any personal property in California. (JA 13.) No marital property was ever located in California. (JA 13.)

According to Husband, his only contacts with California were the result of his agreement that Wife could move there with the parties' children. (JA 13.) Were it not for Husband's strong desire to continue to have frequent and ongoing contact with his children, he would not have been served in California. (JA 13.)

On June 23, 1988, Wife filed a legal memorandum in opposition to Husband's motion to quash. (Doc. #8.) It attached, for "informational purposes", copies of two lengthy affidavits and numerous exhibits, which she had previously filed in Husband's New Jersey divorce action. (Docs. #8, p. 2:17-20, #6, #7.) A few places in Wife's New Jersey affidavit referred to business that Husband would do in California, when he came there to visit the children. These portions are reproduced in the Joint Appendix. (JA 18-20.) In these pleadings, however, Wife did not rely on these contacts to establish jurisdiction. Nor did she claim that Husband had any actual business interests in California, or any contacts with California other than in

connection with his trips there to spend time with their children.[2]

Wife's position was that California had jurisdiction over Husband because he had been personally served, while he was present in California. (Doc. #8, pp. 1-2.) She also argued that New Jersey had recently dismissed Husband's divorce action, and it would be a hardship for her to litigate these issues in New Jersey. (Doc. #8, pp. 2-4.)

On June 30, 1988, the California Superior Court (trial court) held a hearing on husband's motion to quash. (Doc. #10.) The matter was argued and submitted without any testimony.

On September 8, 1988, the trial court signed and filed an order which nominally denied Husband's motion to quash. (JA 21-22.) That order actually granted Husband the substantive relief which he sought because it stated that it had "no personal jurisdiction over [Husband] over any other issue except marital status." (JA 21-22.)

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[2] The length of wife's New Jersey affidavit is therefore misleading. (Doc. #6, Attachment.) Wife had filed it primarily to explain why the marriage broke down, and why the New Jersey court should set their agreement aside. Accordingly, it was not directed to the question of whether Husband had sufficient contacts with California to be subject to personal jurisdiction under a "minimum contacts" analysis.

The other New Jersey affidavit was by an attorney, Tracy Kirkham. (Doc. #7, Attachment.) The marital settlement agreement described her as having assisted the parties in mediating their agreement. (Doc. #4, Ex. A, p. 1, last ¶.) Ms. Kirkham's affidavit was limited to advancing grounds for setting the agreement aside, by claiming that she had not acted as Wife's lawyer. (Doc. #7, Attachment.)

The references in the affidavits to Husband's "certification" are to a pleading filed in the New Jersey action, which is not part of the record in the California action. See, e.g., Doc. #6, Attachment, p. 35, ¶ 65:27.

On September 16, 1988, Wife moved for reconsideration. (Doc. #13.) She filed a supporting legal memorandum, but no declaration. (Doc. #12.) Wife's motion expanded on her argument that California had personal jurisdiction over Husband because he was personally served while present in the state. (Doc. #12, pp. 4:14-6:20.) She also argued that Husband's trips, which combined his visits to see the children with some business meetings, were sufficient contacts for California to exercise personal jurisdiction over Husband because he was served while present in the state. (Doc. #12, pp. 6:21-8:19.)

On September 28, 1988, Husband filed a declaration and a legal memorandum in opposition to Wife's motion for reconsideration. (Docs. #15 and #16.) His declaration further explained that he does not have any license to do business in California, does not pay any sales tax in California, and does not have a business address in California. (JA 23-25.) Rather, his contacts with California all centered on visiting his children there. (JA 23-25.)

The hearing on Wife's motion to reconsider was held on September 30, 1988. (Doc. #17.) The trial court expressed concern about the question of whether service on Husband while he was present in California was a valid basis for personal jurisdiction, regardless of why he was there. It asked counsel if there were a California decision on this point. (Doc. #17, p. 6:21-23.) Neither counsel was aware of such a decision at that time. (Doc. #17, p. 6:24-28.)

On October 5, 1988, the trial court filed an order which vacated its prior order and denied Husband's motion to quash in its entirety. (JA 26.)

Husband moved for reconsideration after discovering a California appellate decision which involved a father who was personally served while he was present in the state to enforce his parental rights. (Doc. #20, Doc. #21, p. 4:12-25.) In that case, the California Court of Appeal upheld the trial court's order quashing service

based on lack of personal jurisdiction. (Doc. #21, p. 4:12-25.)

Wife filed an opposing legal memorandum, and another declaration. (Docs. #22 and #24.) This declaration elaborated on the relationship between Husband's visits with the children and his business contacts with California. (JA 27-29.) Wife also maintained that Husband had been in California on business at least once a year during the marriage, except in 1984. (JA 28.) He would also visit relatives in southern California. (JA 28.)

Husband filed a reply legal memorandum, and a declaration which further described the limited nature of his business contacts with California. (JA 30-32, Docs. #26 and #27.) He explained that he would try to arrange to attend business events in California, such as trade shows and lectures, when he came there to visit the children, in order to help defray the cost of his travel to spend time with them. (JA 30-31, 32.) In this manner, he could deduct some of his expenses for income tax purposes.[3] (JA 30-31, 32.)

The trial court held a hearing on Husband's motion for reconsideration on October 31, 1988. (Doc. #28.) On November 4, 1988, the trial court denied Husband's motion. (JA 33.)

On November 8, 1988, Husband filed a petition for a writ of mandate in the California Court of Appeal. The Court of Appeal denied the petition in an unpublished decision filed on April 7, 1989. (JA 34-35.) It stated that

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[3] The conflict in the declarations concerning the nature and extent of Husband's business contacts with California is irrelevant. The California courts did not uphold jurisdiction on the basis that Husband was doing business in California. Moreover, as explained in section II.E. of the legal arguments, Husband's business contacts cannot constitutionally be a basis for exercising personal jurisdiction over him in Wife's marital litigation.

" . . . personal presence continues to be a valid jurisdictional predicate for *in personam* jurisdiction and that *Shaffer v. Heitner* (1977) 433 U.S. 186 does not compel a contrary conclusion. As the trial court noted, no California or United States Supreme Court case has applied *Shaffer*'s minimum contacts analysis to a defendant present in the forum state and personally served with process."[4] (JA 34.)

SUMMARY OF ARGUMENT

The rule of "transient" jurisdiction, which permits a state to exercise personal jurisdiction over a non-resident defendant who is personally served while present there, has its roots in dicta in *Pennoyer v. Neff*, 95 U.S. 714 (1877). *Pennoyer* adopted a very restrictive view of state court jurisdiction over non-resident defendants. It held that personal jurisdiction could not be exercised unless the defendant was personally served in the state. It also stated that all states do have power over property and persons within their boundaries. This second statement gave rise to the rule of transient jurisdiction.

The rule has long been criticized because it permits personal jurisdiction, regardless of whether it is fair to the defendant, and regardless of whether there is a nexus between the defendant, the facts giving rise to the lawsuit, and the state. On the traditional view, such considerations are irrelevant.

In recent years, it has come to be recognized that physical power over the defendant is not the basis for

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[4] The Court of Appeal went on to note that the exercise of personal jurisdiction over Husband would not discourage visitation because he was present in California for the dual purpose of visitation and conducting business activities. (JA 35.) This was in response to Husband's argument that personal jurisdiction should never be based on service while a parent is present in the state to visit his children because that would unduly burden the exercise of parental rights.

personal jurisdiction. The landmark decision in *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) rejected the approach to jurisdiction based on power. It thus overruled *Pennoyer's* limitation on personal jurisdiction over absent defendants. It shifted the focus of the jurisdictional inquiry to whether the defendant had sufficient contacts with the state to satisfy traditional notions of fair play and substantial justice.

Once it became possible to obtain personal jurisdiction over an absent defendant without the necessity of serving him while he was in the state, and once it was recognized that jurisdiction does not rest on power, the theoretical and practical rationale for the transient jurisdiction rule evaporated. Notwithstanding the unfairness generated by the rule, and the recommendations of commentators that it be rejected, state and federal courts continued to apply the doctrine.

Then, in *Shaffer v. Heitner*, 433 U.S. 186 (1977), the Court held that a state could not assert jurisdiction based on the presence of the defendant's property in the forum state, so-called "quasi in rem" jurisdiction. The Court reiterated its rejection of the power theory of jurisdiction, and stated that **all** assertions of state court jurisdiction must satisfy substantial justice and fair play.

After *Shaffer*, the commentators almost unanimously recognized that transient jurisdiction was inconsistent with the trend of this Court's modern decisions. If jurisdiction no longer can be based on the presence of the defendant's property in the state, logic and fairness required that it could not be based on the mere presence of a person either. The Restatement (Second) of Conflicts of Law, has also recommended a modification of the traditional rule for these reasons.

Decisions which have applied transient jurisdiction after *Shaffer* have done so primarily because this Court has not expressly rejected it. The few attempts to provide a rational defense of the traditional rule are unpersuasive. The time has come for this Court to hold that service on the defendant while he is present in the state is not, by

itself, an adequate basis for the exercise of personal jurisdiction.

Rejecting the traditional rule, or at least modifying and limiting its applicability, is particularly appropriate on the facts here. Husband and Wife lived in New Jersey almost their entire married life. After they separated, they entered into a complete written marital settlement agreement in New Jersey. Wife then moved to California with their children and Husband remained in New Jersey. Husband was served at Wife's home, while he was present in California to visit their children.

In deciding whether a state can exercise personal jurisdiction over a non-resident defendant, one should consider the impact that this would have on the shared interests of the states in furthering fundamental substantive social policies. *Asahi Metal Industry Co., Ltd. v. Superior Court of California*, 480 U.S. 102 (1987). The validity of any procedure by which personal jurisdiction is obtained must also be evaluated in the light of its impact on the defendant's other constitutional rights. *Bendix Autolite Corp. v. Midwesco Enterprises*, 108 S.Ct. 2218 (1988). Mechanical application of the transient jurisdiction rule leaves no room for affording the proper weight to other constitutional interests. The effect of the failure to consider other fundamental rights is brought into sharp focus by the facts of this case.

Fundamental parental rights are protected by the due process clause of the Fourteenth Amendment. *Stanley v. Illinois*, 405 U.S. 645 (1972), and related decisions. There is also a strong social policy, promoted in every state of this nation, to encourage divorced parents to maintain an ongoing relationship with their children.

Predicating personal jurisdiction on service when a parent is present in a state to spend time with his children would seriously impede his fundamental parental right to be involved in raising his children, and would also gravely interfere with the important public policy of encouraging visitation.

For a variety of reasons, it would be particularly inappropriate to permit California to exercise jurisdiction in the present case. Husband only agreed that his children could move to California with Wife because the parties had settled all of their marital disputes in New Jersey. The gravamen of Wife's action is to have that agreement set aside, and to litigate all issues arising out of the breakup of the marriage in California. Allowing her to do this would be the antithesis of fair play and substantial justice. These issues should be litigated in New Jersey, which was the marital domicile, and where the agreement was executed. *Kulko v. California Superior Court*, 436 U.S. 84 (1978).

Finally, the fact that Husband combined his visits to see his children in California with attendance at trade shows and lectures related to his New Jersey business, cannot be a basis for upholding personal jurisdiction. Doing a limited amount of business in a state only permits personal jurisdiction for causes of action arising out of that business. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). Wife's lawsuit is unrelated to Husband's miniscule business contacts with California. Husband's business contacts were not "continuous, systematic or wide-ranging", which would be necessary to subject Husband to general personal jurisdiction for causes of action unrelated to them. *Perkins v. Benguet Mining Co.*, 342 U.S. 437 (1952).

ARGUMENT

I. THIS COURT SHOULD REJECT THE TRADITIONAL RULE OF TRANSIENT JURISDICTION, UNDER WHICH PERSONAL SERVICE ON A NON-RESIDENT DEFENDANT WHILE HE IS PRESENT IN THE FORUM IS A SUFFICIENT BASIS FOR EXERCISING PERSONAL JURISDICTION.

A. The Traditional Rule Was Founded On An Erroneous Premise, And Has Outlived Any Utility It Once Had.

1. The Rule Is Based On Dicta In *Pennoyer v. Neff*.

The foundation for "transient jurisdiction" appears in the reasoning of *Pennoyer v. Neff*, 95 U.S. 714 (1877). The issue in *Pennoyer* was the validity of a judgment obtained in Oregon against a non-resident defendant. The Court held that the judgment was invalid because the defendant had not been personally served while he was present in Oregon. At 719. Therefore, Oregon did not have personal jurisdiction over him. The Court based this holding on what it described as " . . . two well-established principles of public law respecting the jurisdiction of an independent state over persons and property." At 722. First: "Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory." Second: "No state can exercise direct jurisdiction and authority over persons or property without its territory." *Ibid*.

These few sentences imposed a straight jacket on the concept of state court jurisdiction, from which it has taken over a century to escape. From the principles announced in *Pennoyer*, the view developed that because a state's jurisdiction is based on its "power" over persons and property inside its territory, service on a non-resident while he is present in the state not only is necessary for jurisdiction, but also by itself is a **sufficient** basis for jurisdiction. Thus was born the doctrine of "transient

jurisdiction", which some commentators have aptly described as "gotcha" jurisdiction.[5] See Posnak, *A Uniform Approach to Judicial Jurisdiction After World-Wide and the Abolition of the "Gotcha" Theory*, 30 Emory L.J. 729 (1981).

Significantly in *Pennoyer*, the plaintiff had tried to effect service on the defendant by publication, but failed to comply with the technicalities of the relevant Oregon statute. The defendant had not been personally served in Oregon. The Court could have disposed of *Pennoyer* by holding, as had the Oregon court, that the service by publication was defective, without implying that personal service in the state by itself would have been sufficient. Therefore, the rule of transient jurisdiction actually arose out of dicta. See Perdue, *Sin, Scandal, and Substantive Due Process: Personal Jurisdiction and Pennoyer Reconsidered*, 62 Wash. L. Rev. 479, 491-498 (1987).

Despite the venerable age of the transient jurisdiction rule, no decision by this Court has ever upheld it as constitutional, in a case where it was actually exercised. Therefore, rejection of the rule "is not foreclosed by any Supreme Court case directly in point." Schlesinger, *Methods of Process in Conflict of Laws: Some Comments on Ehrenzweig's Treatment of Transient Jurisdiction*, in Leflar, *Transient Jurisdiction – Remnant of Pennoyer v. Neff – A Round Table*, 9 J. Publ. L. 281, 319 (1960). As a result, although overturning the rule would break

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[5] Wife's answer to Husband's petition for certiorari argued that this case does not involve transient jurisdiction because Husband was not caught while he was only "momentarily" in California, or just "passing through." This misses the point. The analytical basis for transient jurisdiction is the mere fact of personal service on the defendant while he was present in the state. That was the basis on which Wife argued California had jurisdiction here, and it is the basis on which the Court of Appeal upheld the exercise of jurisdiction. That California would not have personal jurisdiction over Husband if he had not been served there, is discussed in section II.E.

with a tradition that is more than a century old, it would not require that any decision of this Court be overruled.

2. A State's Power Over Property And Persons Within Its Borders Is Not The Fundamental Basis For Personal Jurisdiction.

In his seminal article, Professor Albert A. Ehrenzweig, a respected and influential critic of transient jurisdiction, demonstrated that the doctrine's theoretical foundation was the assumption that the right of a state to exercise jurisdiction over a defendant is based on the state's physical power. Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289, 293-309 (1956). Ehrenzweig persuasively explains why the belief that physical power is the foundation of jurisdiction is "both factually unsupported and functionally unsupportable under modern conditions." At 296. His careful and detailed historical analysis will not be repeated here.[6]

Husband submits that part of the problem in freeing jurisdictional doctrine from the remaining constraints of *Pennoyer* is that the very question "does a state have jurisdiction?" is conceptually misleading. It suggests that a state might have jurisdiction in the same way that it has mountains and rivers. Thus, if a person or property is "in" the state, it "has" them, and has jurisdiction over them.

In truth, whether a court in one state "has jurisdiction" over a non-resident is only an elliptical way of asking whether, if the forum state allows the plaintiff to obtain a judgment against the non-resident defendant,

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[6] In *International Shoe Co. v. State of Washington*, 326 U.S. 310 (1945) the Court similarly recognized that power is not the basis for jurisdiction. The Court cited Professor Ehrenzweig's article, with apparent approval, in a related context in *Shaffer v. Heitner*, 433 U.S. 186, 205 (1977).

the state where the defendant lives and/or has assets must enforce that judgment. That question ultimately reduces to whether this Court would require the other state to honor the judgment. The answer turns on a fundamental policy decision which this Court must make: whether it is "right" for the forum state to allow a lawsuit against the non-resident defendant to proceed to a binding judgment. If this court concludes that it is right, then the forum has jurisdiction. If this Court concludes that it is not right, then the forum does not have jurisdiction.

In other words, whether a state "has jurisdiction" is a **conclusion** which follows from an analysis of whether it is fair and just to allow the forum to proceed against a non-resident defendant. It is not a **premise,** from which it follows that a court in the forum can proceed.

3. As State Court Jurisdiction Over Non-Resident Defendants Has Been Expanded, There Is No Longer Any Need For The Rule Of Transient Jurisdiction.

Transient jurisdiction originally had a certain utility, in view of the stringent restrictions *Pennoyer* had imposed on personal jurisdiction over non-resident defendants. *Pennoyer* made it almost impossible to obtain personal jurisdiction over someone who did not come to the state. The harshness of that rule was mitigated by allowing a plaintiff to maintain an action against a defendant who did come to the plaintiff's state. "When the law thus came to compel the plaintiff to 'catch' his defendant it quite consistently began to hold this feat sufficient for the establishment of jurisdiction." Ehrenzweig, *supra*, at 308.

This "symmetry" may have made practical sense in 1877. Most transactions were between residents of the same state. People did not travel casually from one state to, or through, another state, as they do today. Thus, it was reasonable to presume that a person who was in a state was there for more than a transitory purpose.

As a plaintiff's ability to obtain personal jurisdiction over a non-resident defendant has expanded, the need to allow a plaintiff to obtain jurisdiction over a person who is served while in the state has abated. As Ehrenzweig explains, " . . . the transient rule, declaring **sufficient** personal service within the state upon nonresidents sued by other nonresidents on foreign causes of action, is most easily explainable as a relic of the *Pennoyer* rule which declares such service to be **required** for the establishment of personal jurisdiction. Once this requirement, breaking down under an increasing number of 'exceptions', ceases to be valid, its creature the transient rule may have reached the end of its course and left the way open for a new approach, satisfying new needs." Ehrenzweig, *supra*, at 312.

The first step towards this new approach occurred when the Court, in *International Shoe, supra*, 326 U.S., at 316, overruled *Pennoyer's* limitation on personal jurisdiction over a non-resident defendant who was not served in the forum. It held that a state can exercise jurisdiction if the defendant had sufficient contacts with the forum to satisfy fair play and substantial justice. *Ibid.* As a result, the rationale for the rule of transient jurisdiction virtually evaporated. "Ever since *International Shoe, Pennoyer v. Neff* has been eligible for oblivion." Hazard, Jr., *A General Theory of State Court Jurisdiction*, 1965 Sup. Ct. Rev. 241, 281.

B. The Development Of Jurisdictional Thinking Reflected In This Court's Decisions Over The Last Four Decades, Which Culminated In *Shaffer v. Heitner*, Points Unswervingly In The Direction Of Rejecting Transient Jurisdiction.

In *Shaffer v. Heitner, supra*, 433 U.S., at 212, the Court stated that " . . . all assertions of state court jurisdiction must be evaluated by the standard set forth in *International Shoe* and its progeny." Thus, many commentators have persuasively argued that after *Shaffer*, service alone on a non-resident while he is physically present in a state

can no longer be constitutionally sufficient to permit the state to exercise personal jurisdiction over him. Rather, the question in all situations must be whether the non-resident has sufficient contacts with the state to make the litigation there appropriate. See, e.g., Bernstine, *Shaffer v. Heitner: A Death Warrant for the Transient Rule of In Personam Jurisdiction*, 25 Vill. L. Rev. 38 (1979); Vernon, *Single Factor Bases of In Personam Jurisdiction – A Speculation on the Impact of Shaffer v. Heitner*, 1978 Wash. U.L.Q. 273, 303.

Virtually all commentators, both before and after *Shaffer*, have advocated abolition of transient jurisdiction. *Shaffer* and its progeny provide the theoretical framework for accomplishing this. See articles collected in Posnak, *supra*, notes 10 and 11 at 731, and commentary at 738-743. The court of appeals reached this conclusion in *Nehemiah v. Athletics Congress of U.S.A.*, 765 F.2d 42, 47 (3d Cir. 1985), as did the Washington Court of Appeal in *Bershaw v. Sarbacher*, 40 Wash.App. 653, 700 P.2d 347, 349, (Wash. Ct. App. 1985), and the district court in *Harold M. Pitman Co. v. Typecraft Software*, 262 F.Supp. 305, 310-313 (N.D. Ill. 1986).

Some courts have suggested that this statement in *Shaffer* cannot carry the weight which the commentators have given to it because neither *Shaffer*, nor *International Shoe*, involved personal service on a defendant who was present in the forum. See, e.g., *Humphrey v. Langford*, 246 Ga. 732, 273 S.E.2d 22, 22-24, (Ga. 1980); *Amusement Equipment, Inc. v. Mordelt*, 779 F.2d 264, 268-269 (5th Cir. 1985). Consequently, before turning to the policy reasons for rejecting the traditional rule, Husband will discuss the underlying rationale of *International Shoe* and *Shaffer*. It will emerge that it is their shift in jurisdictional analysis, which requires rejecting transient jurisdiction.

International Shoe explained that power is not the basis for personal jurisdiction, in the following passage, quoted in many subsequent decisions:

> Historically, the jurisdiction of courts to render judgments in personam is grounded on their de facto power over the defendant's person. Hence,

> his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding. *Pennoyer v. Neff*, 95 U.S. 714, 733. But now that **capias ad respondendum** has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, **if he be not present within the territory of the forum,** he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'.
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> 326 U.S., at 316, emphasis added.

Those who argue in favor of retaining transient jurisdiction rely on the part of the above quotation which seems to suggest that the new rule announced in *International Shoe* would not be applicable, if the defendant were served while present in the forum. See, e.g., *Amusement Equipment, Inc. v. Mordelt, supra*, 779 F.2d, at 269. Immediately after this paragraph, however, the Court explained that because a corporate personality is a fiction, a corporation can only be present in a state by virtue of activities carried on in its behalf. It stated as follows, at 326 U.S., at 316-317:

> to say that the corporation is so far "present" there as to satisfy due process requirements, for purposes of taxation or the maintenance of suits against it in the courts of the state, is to beg the question to be decided. For the terms "present" or 'presence' are used merely to symbolize those activities of the corporation's agent in the state which courts would deem to be sufficient to satisfy the demands of due process.

It is therefore significant that *International Shoe* also stated: " . . . it has been generally recognized that the **casual presence** of the corporate agent or even his conduct of single or isolated items of activities in a state in the corporation's behalf are not enough to subject it to suit on causes of action unconnected with the activities

there." 326 U.S., at 317, emphasis added. The Court concluded that "whether due process is satisfied must depend rather upon the quality and nature of the activity in relation to the fair and orderly administration of the laws which it was the purpose of the due process clause to ensure." At 319.

Thus, even if a corporation could be said to be technically "present" in a state, it does not necessarily follow that the corporation would be subject to jurisdiction. Rather, this depends on whether the corporation's contacts with the state, which gave it a "presence" there, were sufficient to satisfy fundamental concepts of fair play and substantial justice.

By analogy, an individual could be "present" in a state because he is driving through it on the way to somewhere else. From the point of view of fair play and substantial justice, such contacts with the state are no different from those of a corporation which has a technical presence. Yet, that is sufficient to allow the state to exercise personal jurisdiction over the individual defendant under the traditional rule.

The importance of *International Shoe* to the present inquiry, is therefore the following. Previously, in order to exercise personal jurisdiction over an out-of-state defendant, the courts had to analyze the situation in a manner which allowed them to conclude that the defendant was actually "present" in the state in some way. *International Shoe* exploded the myth of presence, and held that it is not the issue. Rather, the issue is whether the defendant had sufficient contacts with the state to make it fair and just to assert jurisdiction over it. It was thus the method of analysis adopted in *International Shoe*, which planted the seed for the destruction of the concept of transient jurisdiction.[7]

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[7] Although *International Shoe* involved a corporate defendant, the Court has recognized that the same analysis applies to individuals. See *Shaffer*, 433 U.S., at 204, n. 19.

International Shoe bore some of its fruit in *Shaffer*. There, the Court took the next logical step by applying its insights to "quasi in rem" jurisdiction. *Shaffer*, of course, did not involve a defendant who had been personally served in the forum. As with *International Shoe*, it is the reasoning process of the decision which is critical.

In *Shaffer*, the plaintiff filed a stockholder's derivative suit in Delaware against Greyhound Lines, Inc. He claimed that the defendants had engaged in activities in Oregon which resulted in damages being assessed against Greyhound in an anti-trust action. The basis for his assertion of jurisdiction over the defendants was that they owned stock in the corporation, which was located in Delaware. Delaware held that, as a result, it could exercise "quasi in rem" jurisdiction over the defendants. "Quasi in rem" jurisdiction is based on attachment or seizure of property which is present in the jurisdiction, rather than on contacts between the defendant and the state. Delaware therefore considered the defendants' lack of contacts with the state to be unimportant, and upheld jurisdiction. 433 U.S., at 189-195.

This Court reversed. It started its analysis by stating that the reasoning of the Delaware court had assumed "the continued soundness of the conceptual structure founded on the century-old case of *Pennoyer v. Neff*, 95 U.S. 714 (1877)." 433 U.S., at 196. *Shaffer* went on to discuss that conceptual structure, and expressly rejected it.

Shaffer pointed out that under *Pennoyer*, a state's authority to adjudicate was based on its power over persons or property. 433 U.S., at 199. Accordingly, a state could not reach beyond its borders. Thus, *Pennoyer* generally favored non-residents by making it harder to sue them. 433 U.S., at 199-200. To ameliorate that difficulty, the courts had struggled to create legal fictions which would allow jurisdiction over out-of-state defendants, while leaving the conceptual structure established in *Pennoyer* theoretically unaltered. At 200-204.

This approach had ended with *International Shoe*, which rejected the creation of exceptions and directly held that power was no longer the central concern. Instead, " . . . the relationship among the defendant, the forum, and the litigation, rather than the mutually exclusive sovereignty of states on which the rules of *Pennoyer* rest, became the central concern of the inquiry into personal jurisdiction." At 204.

Shaffer noted that "no equally dramatic change has occurred in the law governing jurisdiction in rem." At 205. Since "the law of state-court jurisdiction no longer stands purely on the foundation established in *Pennoyer*", the Court recognized that "the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions in rem as well as in personam." At 206. It went on to do precisely that, holding that the presence of property in a state is itself generally insufficient to give it jurisdiction over the property owner. At 207-212. *Shaffer* stated that "The case for applying to jurisdiction in rem the same test of 'fair play and substantial justice' as governs assertions of jurisdiction in personam is simple and straightforward. It is premised on recognition that '[t]he phrase, "judicial jurisdiction over a thing," is a customary elliptical way of referring to jurisdiction over the interests of persons in a thing." At 207.

After discussing the arguments in favor of retaining the traditional rule, the Court concluded that fair play and substantial justice "can be as offended by the perpetuation of ancient forms which are no longer justified, as by the adoption of new procedures which are inconsistent with the basic values of our constitutional heritage. The fiction that an assertion of jurisdiction over property is anything but an assertion of jurisdiction over the owner of the property supports an ancient form without substantial modern justification. Its continued acceptance would serve only to allow state court jurisdiction that is fundamentally unfair to the defendant." At 212.

It was in the light of this theoretical shift in focus, that *Shaffer* stated all assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. At 212. It also stated that "to the extent that prior decisions are inconsistent with this standard, they are overruled." At 212, n. 39.

The import of this broad holding was demonstrated by the next development in this area, when the Court applied the same analysis in *Rush v. Savchuk*, 444 U.S. 320 (1980). In *Rush*, Minnesota asserted quasi in rem jurisdiction by garnishing an insurance company's obligation under its contract to defend and indemnify a defendant who had caused an accident in Indiana. Minnesota exercised jurisdiction, even after this Court had remanded the case to it for reconsideration in light of *Shaffer*. At 324-325. Minnesota had simply followed the rule that New York had adopted in *Seider v. Roth*, 17 N.Y.2d 111, 216 N.E.2d 312, 269 N.Y.S.2d 99 (1966), so-called *"Seider* jurisdiction". This Court reversed, and reiterated its holding in *Shaffer*, that **all** assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny. The inquiry must focus on the relationship among the defendant, the forum, and the litigation. 444 U.S., at 327-333.

The theoretical methodology which the Court used to decide all these cases compels the conclusion that personal service on a nonresident while he is in the forum is no longer by itself constitutionally permissible as the basis for a state to exercise personal jurisdiction over the defendant. Such service was traditionally considered sufficient for the very reasons which *Shaffer* rejected. Traditionally, a state was said to have power over any person or property present within its territorial boundaries. *Shaffer* held that presence of property is not an adequate basis for quasi in rem jurisdiction.

By parity of reasoning, the physical presence of a non-resident in a state can no longer be deemed constitutionally sufficient to permit personal jurisdiction. The

question in all situations must be whether the non-resident defendant has sufficient contacts with the state to make it fair and just that he be required to defend against the litigation there.

Abolishing the doctrine of transient jurisdiction is simply the next logical step in the evolution of this court's decisions on jurisdictional questions. Just as state courts failed to draw the right implications from *International Shoe*, and then from *Shaffer* on the question of *"Seider"* jurisdiction, so too they have not recognized that *Shaffer* sounded the death knell for transient jurisdiction.

C. The Application Of The Traditional Rule Of Transient Jurisdiction Yields Extremely Unfair Results.

As the Third Circuit Court of Appeals noted in *Nehemiah v. Athletics Congress of U.S.A., supra*, 765 F.2d 42, at 47, it is difficult to find a basis in fairness for transient jurisdiction. Indeed, the traditional rule has led to the exercise of jurisdiction in a variety of situations that offend basic notions of fair play and substantial justice.

A leading article on this subject describes pre-*Shaffer* decisions in which jurisdiction was upheld where the non-resident defendant had no contacts with the state, but was personally served while: (1) on board a steamer docked in Boston Harbor; (2) on vacation in the state; (3) in the forum state for a few hours on business, and (4) passing through the forum state traveling to an adjoining state. Bernstine, *supra*, at 44-45. Perhaps the most notorious of these situations occurred in *Grace v. MacArthur*, 170 F.Supp. 442 (E.D. Ark. 1959). There, the doctrine reached the height of absurdity when the district court upheld jurisdiction based on service on the defendant while he was in an airplane passing over Arkansas because the territory of a state includes the air space above it.

The traditional rule has been applied after *Shaffer* to uphold jurisdiction in equally unfair situations. These

include when the defendant: (1) came as a tourist to Nevada to visit friends, *Cariaga v. Eighth Judicial Dist. Court*, 104 Nev. Adv. Ops. No. 82, 762 P.2d 886 (Nev. 1988); (2) came to Georgia one day to go bowling, *Humphrey v. Langford, supra*, 246 Ga. 732, 273 S.E.2d 22; and (3) went to Illinois to celebrate his parents' fiftieth wedding anniversary, *In re Marriage of Pridemore*, 146 Ill.App.3d 990, 497 N.E.2d 818, 100 Ill.D. 640 (Ill. Ct. App. 1986).

The traditional rule also conflicts with a lay person's intuitive sense of fairness. As Professor Schlesinger points out "[t]o civilians, who regard service with process as a procedural rather than a jurisdictional act, it is a strange thought an otherwise contactless forum may acquire jurisdiction in personam by the mere trick of handing a piece of paper to the defendant." Schlesinger, *supra*, at 317. Even one of the few academic defenders of transient jurisdiction concedes that its application should be tempered when it yields an unfair result. Maltz, *Sovereign Authority, Fairness, and Personal Jurisdiction: The Case for the Doctrine of Transient Jurisdiction*, 66 Wash. U.L.Q. 671, 700. This concession underscores the fundamental unsoundness of the traditional rule in its pure form.

Finally, owning property in a state generally indicates a greater affiliation with it than temporary personal presence. It is therefore illogical to deny jurisdiction where the defendant owns property in the state, but to permit it simply because he was served while present there, even though the plaintiff's claim is unrelated to the defendant's contacts with the state. Posnak, *supra*, at 745-746.

Shaffer refused to permit jurisdiction where more affiliations existed between the state, the claim, and the defendant, than if jurisdiction had been based solely on personal service of the non-resident while present in the state. Even if disparate treatment were appropriate, personal service in the state provides less basis for jurisdiction than the presence of a defendant's property. Thus, logic suggests that if the permanent presence of property is not enough, then neither is the temporary presence of a

person who owns no property and has no lasting connection to the state.[8]

D. The Restatement Second of Conflicts of Law, Has Recently Recommended A Modification Of The Traditional Rule.

In response to *Shaffer*, the American Law Institute, as reflected in the Restatement (Second) of Conflict of Laws (1989) recently changed its view. Section 28 now states that "a state has power to exercise judicial jurisdiction over an individual who is present within its territory **unless the individual's relationship to the state is so attenuated as to make the exercise of such jurisdiction unreasonable.**" Emphasis added. Comment b to section 28 notes that in *Shaffer*, the Court rejected the view that the mere presence of a thing in a state will always provide the state with a basis for jurisdiction. This comment also states that since the presence of property only gives the state jurisdiction to determine interests in the property where the exercise of such jurisdiction would be reasonable, "it must likewise follow that considerations of reasonableness qualify the power of a state to exercise personal jurisdiction over an individual on the basis of his physical presence within its territory."

The Restatement then sets forth examples of situations where jurisdiction should, and should not, be permitted. For instance, jurisdiction would be appropriate if the individual's relationship to the state could be described as "significant." This occurs where the defendant has been present "for a substantial period of time." Jurisdiction would also be appropriate if there were "some connection between the state and the particular transaction involved." On the other hand, jurisdiction

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[8] The inadequacy of other justifications which have been offered for retaining the traditional rule are discussed in section I.E.

would be inappropriate where the sole basis for its exercise was the individual's momentary presence within the state, unless there were special circumstances which made jurisdiction reasonable. Such a special circumstance might exist when personal jurisdiction over the individual could not be obtained in any other state of the union.[9]

E. Decisions Which Have Applied The Traditional Rule After Shaffer Do Not Provide An Adequate Justification For Retaining It.

As Professor Schlesinger points out, once the restrictive rules emanating from *Pennoyer* were weakened, the main justification for transient jurisdiction was destroyed. "Within the limits of reason, state legislatures now may enable their courts to reach a nonresident defendant by substituted or constructive service. To the extent that the states make intelligent use of this newly won power, they are no longer in need of the substitute developed when they lacked the power. Hence, they should be able to give up the game of catching the transient." Schlesinger, *supra*, at 318.

Nonetheless, in spite of the logic of *Shaffer*, and the virtually unanimous recommendations of the commentators, the majority of courts have been unwilling to abandon the traditional rule, until this court decrees that they must. Thus, some justifications for the traditional rule have been offered, which do warrant specific comment.

One of the most frequently cited state court decisions is that of the Georgia Supreme Court in *Humphrey v. Langford, supra*, 246 Ga. 732, 273 S.E.2d 22. There, the plaintiff and defendant executed a contract in South Carolina, in which they were both residents. The plaintiff moved to Georgia, and filed a lawsuit concerning the contract. The

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[9] In section II.E., Husband will explain why California would not have jurisdiction over him even under the Restatement's new formulation.

defendant was personally served when he came to Georgia one day to go bowling. The trial court relied on *Shaffer* and granted the defendant's motion to quash. In reversing, the Georgia Supreme Court distinguished this Court's decisions because none of them involved a defendant who was personally served in the forum. It stated: "To our knowledge, the United States Supreme Court has yet to reach [that] issue." 273 S.E.2d, at 24. It then offered the following defense of the traditional rule.

First, the court suggested that it is "not practical to have classifications of sojourners in the state." It was concerned with the difficulty in distinguishing between people who are merely "passing through", and people who have more of a connection to the state. At 24.

This concern simply reveals that due process can require thoughtful analysis in an area where "the grays predominate." See *Kulko v. California Superior Court*, 436 U.S. 84, 91-92 (1978). Although the traditional rule is easy to apply, due process cannot be sacrificed in the name of efficiency. *Shaffer v. Heitner, supra*, 433 U.S., at 211 [sacrificing fair play and substantial justice is too high a cost to pay for simplifying the jurisdictional inquiry]; *Stanley v. Illinois*, 405 U.S. 645, 656 (1972) [due process clause was designed to protect citizens from an overbearing concern for efficiency]. Moreover, if efficiency were the goal, there would be no reason even to require that the non-resident be served in the state. A "bright line" rule could be that a state has jurisdiction over anyone who is personally served, regardless of where that occurred. No one could seriously suggest that such a rule would pass constitutional muster.

Second, the Georgia court stated that "plaintiffs have rights that must also be protected. 273 S.E.2d, at 24. A balancing of rights appears constitutionally fair." This concern is taken into account by the minimum contacts test of *International Shoe* and its progeny. It is the rule of transient jurisdiction which refuses to balance rights

because it allows the plaintiff to sue the defendant in any state where he can serve him personally, regardless of any other considerations.

Third, the court opined that the plaintiff does not really select the forum when the defendant comes to the plaintiff's home state of his own volition. At 24. This reasoning is unpersuasive because the defendant's only real decision is to come to the plaintiff's state. The defendant does not choose to be sued and served there. The plaintiff selects the forum as the place for litigation, and is able to use it whenever he catches the defendant present there.

Moreover, if voluntariness were the issue, there would have to be a subtle inquiry into whether the defendant's presence was truly voluntary, in many situations. For instance, if the only way to drive from California to the state of Washington is to drive through Oregon, is such a driver's presence in Oregon really voluntary in a sense that should allow Oregon to exercise personal jurisdiction?

Fourth, the opinion asserted, "This sovereign state has an adequate court system and is capable of rendering justice between litigants as well as any court system." At 24. This is a non sequitur. For the purpose of jurisdictional analysis, the question is not whether the forum state can, or will, achieve a just result on the merits. It is whether it is reasonable for the state to adjudicate the issue at all.

Finally, the opinion points out that a visitor is required to abide by the state's laws, and can be expected to be protected by them as well. "To accept the state's benefits and to avoid its responsibilities creates an imbalance which we cannot recognize." At 24. This seriously flawed argument draws on a comment by Justice Stevens

in his concurring opinion in *Shaffer*[10] See also, *Lockert v. Breedlove*, 361 S.E.2d 581, 585 (N.C. '87) and *Nutri-West v. Gibson*, ___ Wyo. ___, 764 P.2d 693, 696 (Wyo. 1988).

The use of a state's roads, access to police and fire protection if needed, and medical attention for an injury, are certainly benefits. The question is whether these benefits should subject the traveler to personal jurisdiction in a lawsuit which has nothing to do with any of them.

For instance, if Husband were injured in California, taken to a hospital, and then refused to pay the bill, the hospital could sue him in a California court for payment. Indeed, Husband could be served in New Jersey, yet required to defend that action in California. The reason is that jurisdiction would not be based on his physical presence, but would flow quite naturally from the relationship between the plaintiff, the defendant, the lawsuit and the state. In short, there would be a "nexus" between Husband's presence in California and the action. It would be quite another matter to use Husband's unexercised right to receive medical treatment in California as the basis for a lawsuit by his former wife to set aside a marital settlement agreement executed in New Jersey.

Moreover, it is unrealistic to assume that visiting a state gives rise to the "predictable risk" that if a person is served there, he will have to defend a lawsuit there. Only people versed in the arcane doctrine of transient jurisdiction would know, and could reasonably expect, that they might be required to defend litigation under such circumstances. It would be unreasonable to uphold the doctrine of transient jurisdiction based on the fiction that travelers

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[10] Justice Stevens stated in *Shaffer*, 433 U.S., at 218:

> If I visit another state, or acquire real estate or open a bank account in it, I knowingly assume some risk that the state will exercise its power over my property or my person while there. My contact with the state, though minimal, gives rise to predictable risks.

should reasonably expect something of which they have no actual idea.[11]

Even if a traveler could predict that he might be served with a lawsuit if he crossed into another state, "actual notice, without more, has not been a basis for sustaining the assertion of state-court jurisdiction." Bernstine, *supra*, at 63-64.

Amusement Equipment, Inc. v. Mordelt, supra, 779 F.2d 264 is the other decision which is often cited as containing a defense of the traditional rule. Ironically, this opinion states that "we do not imply that proper service, without more, is in all cases sufficient." At 270, n. 15. Its reasoning reflects that the court of appeals was uncomfortable with pure transient jurisdiction, and reached its result by balancing various factors. The court upheld the exercise of jurisdiction there because it affirmatively answered the question "whether [the defendant] was in a relationship to the forum state that makes it ethical, not onerous, and fair, not oppressive, to subject him to the judicial arm of that state." At 271.

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[11] Husband would have had even less reason to predict that he would be subject to marital litigation in California because the parties had settled their differences by entering into a written marital settlement agreement in New Jersey. This agreement stated that it would be interpreted according to New Jersey law, and that visitation disputes would be resolved by a New Jersey court. Thus, Husband had every reason to believe that any future litigation would be in New Jersey, not California. See, *World-Wide Volkswagen Corp. v. Woodson, supra,* 444 U.S., at 297 " . . . the foreseeability that is critical to due process analysis . . . is that the defendant's conduct and connection with the forum state are such that he should reasonably anticipate being haled into court there." See also, *Burger King Corp. v. Rudzewicz,* 471 U.S. 462, 481 (1985) holding that a choice of law provision in a contract is a relevant consideration in making this determination.

In *Amusement Equipment, Inc.*, a German firm contracted with Amusement Equipment, Inc. to provide machinery for Amusement to display at a convention of the International Association of Amusement Parks and Attractions, to be held in Louisiana. The equipment did not arrive in time and Amusement filed an action in Louisiana. Mordelt, the general manager of the German firm, attended the convention and was served there. The district court quashed service on the ground that the exercise of transient jurisdiction was no longer valid.

The court of appeals reversed because it was "unwilling, absent explicit instructions from above, to ferry this rule across the River Styx. . . ." At 265. It assessed whether there was anything "unfair or unjust" in Louisiana exercising jurisdiction. At 270. It found that this was not unreasonable because Mordelt came to the convention, knowing that Amusement intended to display the equipment there. Therefore, it was "not so unpredictable as to be unfairly burdensome" to require Mordelt to defend a lawsuit there.

The court also justified its holding by twisting beyond recognition, *Shaffer*'s statement that jurisdiction can be exercised if it does not offend traditional notions of fair play and substantial justice. It reasoned that because presence in the state was a traditional basis for jurisdiction, relying on presence did not offend traditional principles of fair play and substantial justice. At 270. This reasoning is circular.

The court next reasoned that an exercise of jurisdiction is an exercise of state sovereignty, and that "if there is anything that characterizes sovereignty, it is the state's dominion over its territory and those within it." At 270. This, too, harkened back to the "presence" aspect of *Pennoyer*, which *International Shoe* rejected. It also missed the point that state sovereignty is limited by the due process clause of the Fourteenth Amendment, which protects individuals from a state's unfair exercise of its sovereignty. *Hanson v. Denckla,* 357 U.S. 235, 251 (1958) [due process not only protects defendants from inconvenience,

but is a limitation on state sovereignty], *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 292, (1980) [due process clause ensures that states "do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system"]. See also, *Insurance Corp. v. Compagnie des Bauxites*, 456 U.S. 694, 702-703, n. 10 (1982) where the Court explained that limits on personal jurisdiction are "ultimately a function of the individual liberty interest preserved by the due process clause."

The opinion next stated that "wholly apart from the significance of service of process, other factors strengthen our view that personal jurisdiction here is just and fair." 779 F.2d, at 270-271. It supported this conclusion by pointing out that Mordelt's presence in the state was purposefully related to his business. "This is not a case in which Mordelt, in a purely personal capacity, visited New Orleans just to see relatives or to enjoy the cooking of Antoine's." Moreover, the parties had entered into the contract in Florida. If Amusement Equipment had brought the action in Florida, a strong argument could have been made that jurisdiction would have been proper, even in the absence of personal service in the state. When the international nature of the transaction was considered, it mattered little whether Mordelt had to litigate in Louisiana, rather than in Florida.[12] At 271.

Finally, the opinion suggested that the defendant could be protected by other devices, such as forum non conveniens. At 271. This is not a realistic protection because it depends on the exercise of discretion. See

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[12] One could therefore defend the result on the theory that a defendant who is not a citizen of the United States is subject to jurisdiction in any state, based on his "national" contacts, rather than on his specific contacts with the forum state. See Degnan and Kane, *The Exercise of Jurisdiction Over and Enforcement of Judgments Against Alien Defendants*, 39 Hastings L.J. 799 (1988).

Schlesinger, *supra*, at 315. A state that has already decided to protect its own citizens by deciding that it has jurisdiction over a defendant who has virtually no contacts with the state is similarly unlikely to dismiss on the ground that it is an inconvenient forum. Given the great deference which reviewing courts pay to a trial court's discretionary rulings, a refusal to dismiss on forum non-conveniens grounds is virtually immune from attack. The due process rights of a defendant should not rest on such a slender reed.

Conclusion

The case for abolishing transient jurisdiction is overwhelming. Husband submits that the time has come for this Court to do so. He will next demonstrate that regardless of what this Court does to the traditional rule, there are compelling reasons for holding that a state cannot exercise personal jurisdiction over a parent who is served while he is visiting his children there.

II. PERSONAL JURISDICTION SHOULD NEVER BE PREDICATED ON SERVICE ON A NON-RESIDENT PARENT WHILE HE IS IN THE FORUM TO VISIT HIS CHILDREN BECAUSE THIS WOULD GRAVELY INTERFERE WITH HIS FUNDAMENTAL RIGHT TO BE INVOLVED IN THEIR UPBRINGING.

Introduction

If this court were to reject the doctrine of transient jurisdiction entirely, and to hold that all assertions of state court jurisdiction must satisfy the minimum contacts test, then California would not have jurisdiction over Husband in this case. See discussion in section II.E. below. On the other hand, this court may wish to take an intermediate position. The question would then become how to decide what, if any, significance should be given to the fact that a non-resident was served while he was present in the state.

In some situations, such as when a non-resident is served in an airplane flying over the state, or while changing planes at an airport, or where neither the plaintiff, the defendant, nor the events giving rise to litigation, has any connection with the forum, it seems apparent that the state should not be able to exercise personal jurisdiction. On the other hand, there could be situations where the non-resident's contacts with the state are insufficient under a minimum contacts analysis, yet service while he was present might tip the balance sufficiently to allow the exercise of jurisdiction, despite due process and fairness concerns.

Husband will now explain why, regardless of which view the court adopts, or even if it retains the traditional doctrine, it should hold that service on a non-resident parent, while he is in a state to spend time with his children, should never be a permissible basis for exercising personal jurisdiction. This rule is necessary to protect the fundamental constitutional right of divorced parents to remain involved in raising their children. It is especially appropriate in this case because the gravamen of Wife's action is an attack on the validity of the parties' written marital settlement agreement, which they executed in New Jersey before she moved to California with the children.[13]

A. Whether A State Can Exercise Personal Jurisdiction Over A Non-Resident Defendant Depends, In Part, On The Impact That This Would Have On His Fundamental Rights.

In *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987) the Court recognized that a variety of factors must be considered in determining whether a state has personal jurisdiction over a non-resident defendant.

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[13] Wife has the right to have California dissolve the marital status without personal jurisdiction over Husband. *Williams v. North Carolina*, 317 U.S. 287 (1942). Similarly, the Uniform

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These include "the shared interest of the several states in furthering fundamental substantive social policies." At 113, citing *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S., at 292.

Bendix Autolite Corp. v. Midwesco Enterprises, 108 S.Ct. 2218 (1988) also supports the view that the existence of a competing constitutional right, can preclude an otherwise permissible exercise of personal jurisdiction over a non-resident. It held that an Ohio law which tolled the statute of limitations during any period that a person or corporation was not "present" in the state, was unconstitutional. It reached that result, in significant part, based on Ohio's requirement that a foreign corporation appoint a resident agent for service of process, in order to be protected by the statute of limitations in the first place. This conduct automatically subjected the corporation to general jurisdiction for all transactions, including those "in which it did not have the minimum contacts necessary for supporting personal jurisdiction . . . " The Court held that such exposure to general jurisdiction imposed an impermissible burden on the corporation's rights under the commerce clause, and was therefore unconstitutional. 108 S.Ct., at 2220-2222.

These decisions demonstrate that in deciding whether a state can exercise personal jurisdiction over a non-resident defendant, one should consider whether to do so would adversely affect other fundamental social policies and/or constitutional rights. Such a competing fundamental policy is implicated here – a policy of

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Child Custody Jurisdiction Act gives a state subject matter jurisdiction to adjudicate child custody and visitation under appropriate circumstances. This does not give it jurisdiction over any other issue. *Kumar v. Superior Court*, 32 Cal.3d 689, 695-702, 652 P.2d 1003, 186 Cal.Rptr. 772 (1982).

constitutional dimensions that must be accorded substantial weight under preexisting authority and present policy. The exercise of transient jurisdiction here adversely affects a parent's right to be involved in raising his children. It flies in the face of strongly held public policy, and imposes an unwarranted and unconstitutional infringement of Husband's fundamental parental rights, to require him to submit to general jurisdiction in California as the price for spending time with his young children.

B. Allowing Personal Jurisdiction To Be Based On Service On A Parent While He Is Present In A State To Spend Time With His Children Is An Unwarranted Interference With His Fundamental Parental Rights And Conflicts With Strong Social Policy Designed To Further The Best Interests Of Children.

1. The Due Process Clause Of The Fourteenth Amendment Protects The Right Of A Divorced Father To Be Involved In Raising His Children.

In *Stanley v. Illinois, supra,* 405 U.S. 645 the Court concluded that the Fourteenth Amendment gives an unmarried father a due process right to a hearing regarding his fitness as a parent, before he can be deprived of his parental rights. It reached this result, in part, by recognizing that a parent's interest in his children "undeniably warrants deference and, absent a powerful countervailing interest, protection." At 651. It described a parent's interest in the companionship, care, custody, and management of his children, as being more important than interests which derive from economic arrangements. *Ibid.* See also *Kulko v. California Superior Court, supra,* 436 U.S. 84, at 97 which similarly distinguished between a defendant's commercial activities and matters arising out of a domestic dispute.

Stanley relied on numerous decisions protecting similar interests under the Fourteenth Amendment. For instance, *Stanley* noted that the right to conceive and raise one's children is "essential", citing *Meyer v. Nebraska,* 262 U.S. 390, 399, (1923), "a basic civil right", citing *Skinner v. Oklahoma,*

316 U.S. 535, 541 (1942), and a right which is "far more precious than property rights", citing *May v. Anderson,* 345 U.S. 528, 533 (1953). At 651.

This view was reiterated recently in *Michael H. v. Gerald D.,* 109 S.Ct. 2333 (1989). It pointed out that there is a long history which recognizes constitutional protection for certain fundamental parental rights, citing *Quilloin v. Walcott,* 434 U.S. 246 (1978), *Caban v. Mohammed,* 441 U.S. 380 (1979), and *Lehr v. Robertson,* 463 U.S. 248 (1983).[14] At 2342.

A majority of the court found that no such interest was present on the unusual facts in *Michael H.,* because the man was attempting to establish parental rights with a child living in an intact family, based on an affair he had with the mother. Nonetheless, even the lead opinion recognized that the due process clause provides protection to interests which are "so rooted in the traditions and conscience of our people as to be ranked as fundamental" and which reflect the "basic values that underlie our society".[15] At 2342.

A divorced father who has been involved in raising his children since their birth unquestionably has a

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[14] *Quilloin* observed that this Court had " . . . recognized on numerous occasions that the relationship between parent and child is constitutionally protected." 434 U.S., at 255. *Lehr* explained that "the intangible fibers that connect the parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases." 463 U.S., at 256.

[15] The dissenting opinions agreed on this point. "Where the interest under consideration is a parent-child relationship, we need not ask, over and over again, whether that interest is one that society traditionally protects." At 2352 (Brennan, J., dissenting). "Prior cases here have recognized the liberty interest of the father in his relationship with his child." At 2360 (White, J., dissenting).

fundamental constitutional right to continue parenting his children. Thus, in considering whether California can exercise personal jurisdiction over a parent based on the fact that he was served while in a state to spend time with his children, it is necessary to consider the degree to which this would burden the exercise of that right.[16]

2. All States Share The Strong Social Policy Of Encouraging Divorced Parents To Maintain An Ongoing Relationship With Their Children.

All states recognize that the best interests of children is furthered by encouraging divorced parents to maintain an ongoing relationship with their children. This policy has been emphasized in California. For instance, in *Kumar v. Superior Court, supra,* 32 Cal.3d 689, at 703-704, 652 P.2d 1003, 186 Cal.Rptr. 772, the California Supreme Court held that California did not have personal jurisdiction over a parent whose only contacts involved his efforts to spend time with his children there. In *Kumar*, the father was not served while he was in California. He had, however, invoked the California courts to enforce his visitation rights with his children. The mother argued that this should constitute a general appearance. 32 Cal.3d, at 703. The California Supreme Court rejected her position. It refused to permit California to exercise personal jurisdiction because the father's "connection with the state resulted from an effort to encourage visitation." At 703-704. See also Cal. Civ. Code § 4600 (Deering 1989 Supp.) it is "the public policy of this state to assure minor children of frequent and continuing contact with both parents after the parents have separated or dissolved their marriage. . . ."

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[16] In section II.C.2., Husband will set forth specific examples of how upholding California's exercise of personal jurisdiction would impose an undue burden on his exercise of fundamental parental rights.

In *Titus v. Superior Court*, 23 Cal.App.3d 792, 801-805, 100 Cal.Rptr. 477 (Cal. Ct. App. 1972) the California Court of Appeal similarly quashed service over a non-resident father, stating: "It is a strong policy of the law to encourage the visitation of children with their parents. Such a policy should be fostered, rather than thwarted." 23 Cal.App.3d, at 803. Reaching the same conclusion, the court in *Judd v. Superior Court*, 60 Cal.App.3d 38, 45, 131 Cal.Rptr. 246 (Cal. Ct. App. 1976) stated: "It should be a matter of strong public policy to encourage the payment of support and communication between a natural father and his children, not to discourage the same by subjecting the father to the expense and inconvenience of relitigating this matter of support in our state."

In none of the foregoing situations was the father served in California. Nonetheless, this additional factor did not yield a different result in *In re Marriage of Malak*, 182 Cal.App.3d 1018, 227 Cal.Rptr. 841 (Cal. Ct. App. 1986). There, the non-resident father was personally served while he was present in California to enforce his parental rights. At 1021. The California Court of Appeal upheld the trial court's ruling that California did not have personal jurisdiction, without even discussing transient jurisdiction. At 1023-1024.

Virtually every state has enacted the Uniform Child Custody Jurisdiction Act (hereafter "UCCJA"). See list in Am.Jur.2d Desk Book, Item 124. Cal. Civ. Code §§ 5150, et seq. (Deering 1984). It delineates the circumstances under which a state can exercise jurisdiction over issues relating to custody and visitation. See, e.g., Cal. Civ. Code § 5152 (Deering 1984). The UCCJA explicitly excludes jurisdiction to decide issues relating to child support. See, e.g., Cal. Civ. Code § 5151(2). (Deering 1984.)

Thus, the states have recognized that for jurisdictional purposes issues relating to the parent/child relationship should be kept separate from financial issues. This policy would be defeated if a state exercised subject matter jurisdiction under the UCCJA to resolve a custody dispute, and personal jurisdiction could be obtained over

the non-resident parent because he could be served while in the state solely for a custody hearing.

C. Allowing Personal Jurisdiction To Be Based On Service While A Parent Visits His Children Would Produce Undesirable Results.

1. Allowing Such Jurisdiction Places The Non-Resident Parent In An Intolerable Position And Undermines The Ability To Settle Marital Disputes.

It is Husband's position that, as a general principle, personal jurisdiction should never be allowed when it is predicated on service on a non-resident parent, when he is present in a state to spend time with his children. Such visitation should be considered to be in a "safe harbor" or a "sanctuary".

If this is not the case, the out-of-state parent must make a Hobson's choice: Either he will decide not to travel to spend time with his children because of fear that he will become embroiled in litigation, or his visits will become occasions during which he cannot devote his energy to his children because he must be involved in defending against a lawsuit. In either situation, the result is to impose a chilling effect on the non-custodial parent's constitutional right to participate in raising his children.

Permitting such exercise of jurisdiction would also deter spouses from settling their marital disputes in a manner which permits the custodial parent to move to another state. It is not uncommon for a spouse to have second thoughts and try to have a marital settlement agreement set aside. See, e.g., *In re Marriage of Stevenot*, 154 Cal.App.3d 1051, 202 Cal.Rptr. 116 (Cal. Ct. App. 1984). The parent who remains in the state of the marital domicile will fear that once the other parent has left, he or she will try to upset their agreement and obtain an advantage from being in a new jurisdiction, as Wife is attempting to do here. Spouses should be encouraged to

settle their marital problems expeditiously, without adversarial litigation that can harm the children, and with finality. These goals would be discouraged if marital wounds can be easily reopened in a foreign forum.

This approach follows implicitly from this Court's decision in *Kulko v. California Superior Court, supra*, 436 U.S. 84. The Court held that California did not have personal jurisdiction over the father, in the mother's action to modify child support, because he did not have sufficient contacts with California. He had simply helped his daughter move from New York to California, to live with the mother. At 87-88. It is difficult to assert in any logical fashion that the result would have been different if, instead of buying a ticket and placing his daughter on an airplane in New York, the father had accompanied her to California and been personally served in the process.

Kulko also held that the California Supreme Court had correctly refused to exercise personal jurisdiction on the basis that the father allowed the children to live with the mother in California for three months each year, under the parties' original agreement. As the court observed, allowing jurisdiction to be based on such a ground could "arbitrarily subject one parent to suit in any state of the union where the other parent chose to spend time while having custody of their offspring pursuant to a separation agreement." At 93. That very possibility of arbitrariness is implicated here as well.

There is no reason to allow a mother to escape from the unfairness which the Court perceived in *Kulko*, by the device of personally serving the father when he comes to California to spend time with his children.

2. Application Of The Rule Husband Advocates Is Especially Necessary In The Present Case.

a. The Burnham children are now only 3 and 9 years old. They live 3,000 miles away from their father and the youngest cannot fly unaccompanied. As a practical matter, Husband will lose contact with them during their

important formative years, if he cannot safely come to California to spend time with them.

It is expensive and inconvenient for Husband to travel to California, and he is unable to do it frequently. Whatever time he is able to spend with his children there is precious. Husband should not have to visit them under the pall of attending to Wife's litigation while he is in California. His trips to California to spend time with his children should not have to become a nightmare, filled with depositions, court appearances, and other matters related to Wife's lawsuit.

Moreover, family law litigation does not end with the initial trial. There can be successive hearings on support modification, until Husband's obligations cease. Thus, he would be subject to repeated court battles in California, even if the marital settlement agreement is upheld.

b. Husband was unwilling to agree that Wife could be the custodial parent, and move across the country with the children, unless she guaranteed him liberal visitation rights. Their marital agreement provided for this, and also that any disputes concerning visitation would be resolved by the New Jersey court. When Wife filed this action in California, she requested custody over the children, but no provision for visitation. The parties have had ongoing visitation disputes since Wife moved to California.

Under California law, Husband cannot obtain a court hearing to obtain a visitation order, until both parents participate in mediation. Cal. Civ. Code § 4607. (Deering 1989 Supp.) Unless the rule Husband advocates is adopted, Wife could serve him at the mediation.

Moreover, California does not recognize an immunity from service, while a person is present in connection with other litigation. *Silverman v. Superior Court*, 203 Cal.App.3d 145, 149, 249 Cal.Rptr. 724 (Cal. Ct. App. 1988). Therefore, if Husband came to California for mediation of visitation disputes, he could be served in a lawsuit by anyone else who purports to have a claim against him.

c. Wife's action is far from limited to disputes involving their children. Her primary goal is to have a California court invalidate the marital settlement agreement, which the parties executed in New Jersey. That litigation promises to be complex and to involve numerous issues in which California has no interest. All of the events surrounding the threshold issue of the validity of the agreement occurred in New Jersey. If the agreement is set aside, there will have to be a full trial on all of the issues concerning property characterization, valuation, and division. All the evidence regarding this is also in New Jersey.

The lawsuit should be in New Jersey. See *Kulko v. California Superior Court, supra*, 436 U.S., at 97, where the Court recognized that personal jurisdiction was inappropriate where the wife sought to use a California court to modify an agreement executed in New York.

d. This is not a situation in which one of the parents moved to another state before matters were settled. In many situations, the plaintiff and defendant live in different states when the events giving rise to the plaintiff's cause of action occur. In that situation, one of them will have to appear in a foreign state, if their dispute results in litigation. By contrast, if Wife was under duress when she signed the agreement, she must have known this before she left New Jersey. Thus, her cause of action arose before she left New Jersey and she could have litigated it there before she left. She can still do so now. Wife is actively represented by counsel in New Jersey, through whom she has been resisting Husband's efforts to have matters resolved there. (JA 17.)

Allowing Wife to obtain personal jurisdiction over Husband to litigate this issue in California, by serving him when he was present there to spend time with the children, is the very antithesis of fair play and substantial justice. As this Court pointed out in *Kulko, supra*, 436 U.S., at 97, "basic considerations of fairness point decisively in favor of [Husband's] state of domicile as the proper forum for adjudication of this case, whatever the merits

of [Wife's] claim. It is [Husband] who has remained in the state of the marital domicile where it is [Wife] who has moved across the continent."

D. State Court Decisions Which Have Upheld Transient Jurisdiction In A Family Law Context Have Not Given Any Reasons in Defense Of It.

A few state courts have upheld transient jurisdiction in a family law context. None has offered a reasoned defense for doing so. None has considered the chilling effect on the exercise of fundamental parental rights, or the detrimental effect on the children. Instead, they have applied the traditional rule unthinkingly, based on its application in other situations, and on the fact that this Court has yet to explicitly reject the doctrine.

In light of the extensive academic criticism of the rule, it is surprising that so few courts have been willing to depart from it. Perhaps this state of affairs is an indication of how each state is overly concerned with protecting its own residents, rather than observing constitutional limits.

For instance, in *Hutto v. Plagens*, 254 Ga. 512, 330 S.E.2d 341, (Ga. 1985) the parties divorced in South Carolina in 1975. The mother was awarded custody, and the father was given reasonable visitation rights. The mother moved to Georgia and served the father with a petition for modification of child support, while he was there visiting the children. The Georgia Supreme Court upheld personal jurisdiction on the ground that service on a non-resident while he is physically present in the state is sufficient under the traditional rule. It simply followed its decision in the non-family law case of *Humphrey v. Langford, supra*, 246 Ga. 732, 273 S.E.2d 22, which is discussed above in section I.E. See also, *Gant v. Gant*, 254 Ga. 239, 327 S.E.2d 723 (Ga. 1985) and *Browne v. Browne*, 258 Ga. 636, 373 S.E.2d 367 (Ga. 1988) which reached a similar result based on *Humphrey*.

In re Marriage of Pridemore, supra, 146 Ill.App.3d 990, 497 N.E.2d 818 upheld jurisdiction in the wife's action to increase child support, after the husband was served while he was in the state to celebrate his parent's 50th wedding anniversary. The opinion relied on the Georgia decisions discussed above without analysis. 497 N.E.2d, at 820.

Brookshire v. Brookshire, 89 N.C.App. 48, 365 S.E.2d 307, 311, (N.C. Ct. App. 1988) held that North Carolina had personal jurisdiction over a father served while visiting his children and parents in the state. It simply relied on a North Carolina Supreme Court decision, which had upheld the validity of transient jurisdiction in a commercial context, *Lockert v. Breedlove*, 321 N.C. 66, 361 S.E.2d 581, (N.C. 1987). See also *Jenkins v. Jenkins*, 89 N.C.App. 705, 367 S.E.2d 4, (N.C. Ct. App. 1988) and *Morris v. Morris*, 91 N.C.App. 432, 371 S.E.2d 756 (N.C. Ct. App. 1988) which reached the same result.

In *Swarts v. Dean*, 13 Kan.App.2d 228, 766 P.2d 1291 (Kan. Ct. App. 1989), the parents married in Kansas and divorced in Texas in 1976. The mother returned to Kansas with the children. In 1988, the mother filed a motion to increase child support, and served the father while he was visiting the children in Kansas. The Court of Appeal upheld the exercise of personal jurisdiction relying on *Pridemore, Lockert* and *Jenkins*.

By contrast, the Washington Court of Appeal relied on *Shaffer* and refused to apply transient jurisdiction in a family law context in *Bershaw v. Sarbacher, supra*, 40 Wash.App. 653, 700 P.2d 347. There, a paternity action was served on the non-resident defendant while he was visiting the mother and the child. The trial court granted his motion to dismiss for lack of personal jurisdiction, and the Washington Court of Appeals affirmed. 700 P.2d, at 349. See also *In re Marriage of Markowski*, 50 Wash.App. 633, 749 P.2d 754, 756 n. 2 (Wash. Ct. App. 1988). For the reasons explained throughout Husband's brief, this is the better rule.

E. The Fact That Husband Arranged To Attend Business Events When He Came To Visit His Children Does Not Permit California To Exercise Personal Jurisdiction Over Him.

1. When Husband Was Served, He Was In California To Spend Time with His Children.

The California Court of Appeal seemed to think that exercising personal jurisdiction would not discourage Husband from spending time with his children because he was coming to California for business reasons anyway. (JA 35.) This is incorrect because Husband simply arranged to attend events in California, such as trade shows and lectures, in order to minimize the expense of coming here to spend time with his children, by taking advantage of the income tax laws. (JA 30-31.) Indeed, Wife served him at her home.

If Husband had been aware that attending business related events would subject him to Wife's litigation in California, he could have chosen not to go to them. They certainly were not important enough to bring Husband to California, if his children did not live here. His reason for coming to California was to spend time with his children.

2. California Does Not Have Personal Jurisdiction Over Husband In Wife's Family Law Action, On The Basis Of His Few Business Contacts With California.

Husband's business contacts in California were insufficient to satisfy the minimum contacts test for personal jurisdiction for two reasons.

First, doing a limited amount of business in a state only permits the state to exercise personal jurisdiction over a non-resident defendant on a cause of action arising out of that business. *McGee v. International Life Ins. Co.*, 355 U.S. 220 (1957). See also, the California Judicial Council Comments to California's long arm statute, Cal. Code Civ. Proc. § 410.10 (West 1973).

Wife's family law action certainly does not arise out of Husband's business contacts with California. See, e.g., *Judd v. Superior Court, supra*, 60 Cal.App.3d, at 44, 131 Cal.Rptr. 246, where the California Court of Appeal made this point in the context of a family law action. California has also recognized that it cannot exercise personal jurisdiction over a parent who combines trips there to spend time with his children with some business. *Modlin v. Superior Court*, 176 Cal.App.3d 1176, 1179-1182, 222 Cal.Rptr. 662 (Cal. Ct. App. 1986).

Second, Husband's limited business in California is insufficient to give the state "general" jurisdiction over him to adjudicate a cause of action that does not arise out of it. See *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408, 414-416 (1984) for a discussion of the difference between general and specific jurisdiction. General jurisdiction only exists when the non-resident's business contacts with the forum state are "wide-ranging, continuous, and substantial." *Perkins v. Benguet Mining Co.*, 342 U.S. 437, 445-449 (1952). That is far from the situation here. For example, in *Cornelison v. Chaney*, 16 Cal.3d 143, 146-149, 545 P.2d 264, 127 Cal.Rptr. 352 (1976) the California Supreme Court recognized that it would be unconstitutional to exercise general jurisdiction over a non-resident defendant who had an abundance of business contacts with California, which were considerably more extensive than Husband had here.

Indeed, the trial court originally concluded that California did not have personal jurisdiction over Husband. (JA 21-22.) Wife's motion for reconsideration strongly argued that the minimum contacts test did not have to be satisfied because Husband was personally served while he was physically present in California. (Doc. #12, pp. 4:14-8:19.) The trial court then changed its ruling. (JA 26.) Thus, if Husband had not been served in California, his challenge to jurisdiction would have been sustained. Husband's physical presence in

California – not his business contacts there – were the key to the trial court's legal ruling.[17]

The Court of Appeal explicitly stated that California's exercise of personal jurisdiction over Husband was proper because service on a non-resident defendant while he is present in the state remains sufficient after *Shaffer*. (JA 34.)

Finally, if the new standard suggested in the Restatement (Second) of Conflicts of Law § 28 were applied, personal jurisdiction over Husband would still be improper. When all of the factors discussed throughout this brief are considered as a whole, asserting personal jurisdiction over Husband in Wife's action would be unreasonable.

Husband was not present in California for a "substantial" period of time. There is no connection between Husband's presence and Wife's attack on their marital settlement agreement. The minimal business contacts husband had with California are not related to Wife's lawsuit in any manner. Husband is available for service

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[17] The trial court's order stated that it had also considered a New Jersey order dismissing Husband's divorce action there. (JA 26.) Nothing in that order adjudicates whether California can exercise personal jurisdiction over Husband. (Doc. #12, Ex. pp. 1-11.) The sole issue before the New Jersey court was whether Husband's divorce action should be dismissed because he had not complied with a New Jersey statute requiring a summons to be served within ten days after it is issued. (*Id.*, pp. 1-2.)

The only part of the New Jersey order which touches on jurisdiction is a comment regarding where custody and visitation should be litigated under the UCCJA. (*Id.*, pp. 7-10.) The court indicated that those issues should be resolved in California. (*Ibid.*) Which state would be a better forum for those issues, under the subject matter jurisdiction given by the UCCJA, has nothing to do with the constitutional issue of personal jurisdiction. See *Kumar v. Superior Court, supra*, 32 Cal.3d, at 695-704, 186 Cal.Rptr. 772, 652 P.2d 1003, where the California Supreme Court made this very distinction.

in New Jersey. It is a completely appropriate state in which to litigate the validity of the parties' agreement, which was executed there.

CONCLUSION

For the foregoing reasons, and based on the cited authorities, it is respectfully submitted that this Court instruct the California Court of Appeal to issue a writ of mandate, compelling the California Superior Court to grant Husband's motion to quash for lack of personal jurisdiction, or that this court itself direct the Superior Court to do so.

Respectfully Submitted,

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Supreme Court, U.S.
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No. 89-44

In The

Supreme Court of the United States

October Term, 1989

DENNIS BURNHAM,

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FRANCIE BURNHAM,

Real Party In Interest.

**On Writ Of Certiorari To The
California Court Of Appeal
First Appellate District, Division Five**

BRIEF ON THE MERITS FOR REAL PARTY IN INTEREST

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QUESTION PRESENTED FOR REVIEW

Can California properly exercise *in personam* jurisdiction over a non-resident husband in a legal separation action where husband has been personally served with the petition and summons while actually present in California during one of several regular contemporaneous visits to California for a variety of purposes, including visitation with his children, attendance at business meetings and functions, and attending to other personal matters?

In this case, as in so many others, one or the other of the parties will be required to litigate the family law issues involved in a forum at the other end of the continent from where he or she lives. For more than a century, at least since this Court issued its opinion in *Pennoyer v. Neff*, 95 U.S. 714 (1877), it has been a fundamental principle of law in this country that a non-resident defendant who is physically present in the forum state and is there served with process is subject to the *in personam* jurisdiction of the courts of that state. In *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977) this court said: "We therefore conclude that all assertions of state-court jurisdiction must be evaluated according to the standards set forth in International Shoe and its progeny." This case presents the question: what is the impact, if any, of that statement on the traditional rule that service of process upon a non-resident defendant while he is personally present within the forum state is a sufficient basis for subjecting him to the jurisdiction of that state?

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BRIEF ON THE MERITS FOR REAL PARTY IN INTEREST

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Fourteenth Amendment, United States Constitution:

> SECTION I. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of

> the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

California Code of Civil Procedure, Section 410.10:

> A court of this state may exercise jurisdiction on any basis not inconsistent with the constitution of this state or of the United States.

California Civil Code Section, Section 4503:

> A proceeding for dissolution of the marriage or for legal separation may be commenced by filing in the superior court a petition entitled "In re the marriage of. . . .and. . . ." which shall state whether it is a petition for the dissolution of the marriage or a legal separation. A copy of the petition together with a copy of a summons in form and content approved by the Judicial Council shall be served upon the other party to the marriage in the same manner as service of papers in civil actions generally.

STATEMENT OF THE CASE

Dennis Burnham (Husband) and Francie Burnham (Wife) were married in West Virginia in 1976. They moved to New Jersey in 1977 where they resided until July of 1987 when they separated by mutual agreement (Doc. 6, 3-17-88 Affidavit, Par. 2)[1]. During these years

[1] Reference to record material that is not included in the Joint Appendix is referred to as "Doc" followed by the docket

(Continued on following page)

they had two children, Rachel, born October 30, 1979, and Ari, born August 11, 1985 (JA 5, 11-12). In connection with their separation it was mutually agreed that the wife and children would move from New Jersey to California where wife had lived prior to her marriage to husband (JA 17-18, Doc. 6, Aff. Par. 9, 12, 14, 15, 19). Husband, who maintained control over the parties' money (Doc. 6, Aff. Par. 23), agreed to pay the expenses relating to the move and it was also agreed that wife would take furniture and furnishings which constituted a portion of the marital property (Doc. 6, Aff. Par. 33, 34, 43). A few days before the wife and children left for their new home in California, husband and wife signed a marital settlement agreement that had been prepared by a New Jersey attorney who had been a boyhood friend of husband's and who had agreed to serve as an impartial mediator in attempting to assist husband and wife in reaching an agreement regarding the termination of their marriage and the incidents relating thereto (Doc. 6, Aff. Par. 15, 16, 24, 25, 40). The validity and enforceability of this purported agreement is in dispute between the parties, it being wife's position at all times that husband procured her signature on the agreement through fraud, duress and undue influence. Further in connection with their separation, husband and wife agreed that wife would be the plaintiff or petitioner in a marital dissolution proceeding based upon the ground of "irreconcilable differences" (Doc. 6, Aff. Par. 15, 30, 40, 47). In the days

(Continued from previous page)

number that corresponds to the particular item as set forth in the Chronological List of Relevant Docket Entries included in the Joint Appendix at page 1.

preceding wife's signing the above-mentioned marital settlement agreement, husband several times threatened to "slap a restraining order" on her to prevent the wife and children from moving to California unless wife signed the agreement that husband and his attorney friend had prepared (Doc. 6, Aff. Par. 20, 24, 25, 28, 37). Wife signed the agreement on July 9, 1987, and on July 14, 1987, husband drove the wife and children to the airport in New Jersey where, using airplane tickets husband had previously purchased for them, they boarded a plane and flew to their new home in California (Doc. 6, Aff. Par. 19, 40, 42).

On October 21, 1987, notwithstanding the parties' agreement that wife would be plaintiff in an "irreconcilable differences" dissolution Petition, husband filed an action for divorce in New Jersey on the ground of "desertion". In his petition husband requested that the court incorporate the agreement previously signed by husband and wife. Upon filing of his Petition husband did not obtain the issuance of a Summons and did not attempt to have the Petition and Summons served upon wife. Thereafter, when wife learned of husband's New Jersey "desertion" Petition, she demanded that he withdraw it and honor their prior agreement concerning an "irreconcilable differences" divorce. She did not ever merely request that husband delay service of the New Jersey proceedings upon her. Although husband orally agreed to withdraw his petition and honor the prior agreement relating to an "irreconcilable differences" divorce, he did not do so and, when wife realized that she could not trust husband to honor his prior agreement, she engaged a California

attorney who filed an action for legal separation in California on January 5, 1988.

Later in January, husband was in Southern California on business and had made plans to travel to the San Francisco Bay Area to see his children after concluding his business in the Los Angeles area. On January 18, 1988, husband telephoned wife from his sister's home in the Los Angeles area and told her that he had received a phone call from his New Jersey office informing him that his New Jersey business partner had accepted California court papers on his behalf (JA 18). Three days later on January 21, 1988, husband arrived in the San Francisco Bay Area to see his children. That day he took them to the park and the next day, after conducting some business, he came to take Rachel for the weekend in San Francisco. On Sunday morning January 24, 1988, husband brought Rachel home and then spent some time with Ari at a local playground. Later, as he was preparing to leave wife and children's home, he was served with a Summons and a copy of wife's Legal Separation Petition by a friend who was visiting the wife and children (JA 19). On January 30, 1988, wife was served with a New Jersey Summons and a copy of husband's New Jersey "desertion" Petition (Doc. 6, Aff. Par. 55).

On several occasions prior to the weekend when he was served with wife's petition in Mill Valley, California, husband had traveled to California from New Jersey. On the weekend of October 23-25, 1987, husband had conducted a business seminar in the Napa Valley and he took Rachel with him for the weekend. Husband apparently remained in California during the next week because, on the following Friday, October 30, 1987, he attended

Rachel's birthday party after spending the day doing business in the San Francisco area (JA 18). Subsequent to being served on January 24, 1988, husband has continued to travel regularly to California during which trips he has both visited his children and attended to his own personal and business interests (JA 19-20).

After being served with husband's New Jersey Petition and realizing that husband had no intention of honoring the parties' agreement relating to an "irreconcilable differences" divorce, wife appeared through counsel in the New Jersey proceeding and sought to quash service of the Summons upon her and also to have the Petition and Summons dismissed. She filed a detailed affidavit in New Jersey which, in significant part, sought to support her position that the purported marital settlement agreement was invalid and unenforceable because it was procured through fraud, duress and undue influence (Doc. 6). On June 3, 1988, the New Jersey Superior Court granted wife's Motion to Quash and dismissed the New Jersey Complaint and Summons. In its decision on wife's Motion to Quash and Dismiss, although the New Jersey court did not resolve on the merits the parties' dispute as to the validity of the marital settlement agreement, it did make findings relating to that agreement (Doc. 12, Exhibit "A").

Since husband attempts to characterize the agreement in one way and wife perceives the agreement and the circumstances surrounding its negotiation and execution in a very different light, it might assist this Court to know the view of the New Jersey courts regarding that agreement. The New Jersey court found that, although husband *claimed* that his failure to earlier serve wife in

the New Jersey proceedings was wife's fault, "there is serious question as to Mr. Burnham's good faith or lack of same surrounding the Property Settlement Agreement signed by the parties on July 8, 1987" (Doc. 12, Exhibit "A", Statement of Reasons, p 2). It also found that, although the conduct of husband's New Jersey attorney-friend re-enforced wife's belief that he was acting as an impartial mediator, in fact, it appeared that he had been acting on behalf of husband (Id., pp 2, 3, 5). The court also found that "it is clear that there are some problems" with the terms of the agreement, particularly in that it provided for an unequal distribution of the marital assets in favor of husband and that there was "absolutely no indication that Mr. Burnham was required to make a full and complete disclosure of the true value of his family business interests. In fact, it appears that Ms. Burnham had no current knowledge regarding the true value of the major marital assets" (Id., pp 3-5). It was also concluded that husband was in a "vastly superior negotiating position at the time of the Agreement", and that "there is a serious question as to whether or not Mr. Burnham was acting in good faith when the parties negotiated to resolve their differences as set forth in the July 7, [sic] 1987, Agreement"(Id., p 5). The court further found that wife "was anxious to move to California but could not leave with the children until the Agreement was finalized" and that there was support for wife's contention that she viewed the signing of the Agreement as a "take it or leave it" proposition (Id., p 7). The court determined that "the burden of inconvenience should be balanced in favor of Ms. Burnham and the children" and that "the

more appropriate forum for litigating this matter is in California . . . " (Id., pp 7, 10).

Subsequent to the above decision husband filed a second divorce Petition in New Jersey and that Petition was similarly dismissed in an Order dated October 14, 1988. Husband appealed both Superior Court Orders dismissing his divorce actions and both Orders of Dismissal were upheld on appeal in a decision that determined, in part, that the trial court's Orders were "grounded in the belief that plaintiff [husband] had deliberately and unfairly manipulated defendant [wife] into moving to California so that he could bring his divorce action in New Jersey where it would be the most convenient for him and most inconvenient for defendant . . . ." The Appellate decision held "we affirm both Orders under review substantially for the reasons stated by Judge Graves of the Chancery Division, Family Part in his detailed and comprehensive statement of reasons filed with the Order of June 3, 1988." (The full text of the New Jersey appellate decision is set forth in Appendix I to this Brief.)

On April 12, 1988, husband filed a Motion to Quash service of the Summons in the California proceedings initiated by wife on the ground that California lacked *in personam* jurisdiction over him. In response to that motion wife filed a declaration which attached and incorporated by reference the affidavit she had filed in New Jersey in support of her Motion to Quash and Dismiss the New Jersey proceedings (Doc. 6). In opposition to husband's Motion to Quash, wife argued that California did have personal jurisdiction over husband and that it would be a hardship for wife to be required to litigate the marital

separation issues in New Jersey (Doc. 8). On September 8, 1988, the California Superior Court denied husband's Motion to Quash, and found that it had jurisdiction as to marital status but had no personal jurisdiction over husband (JA 21-22).

On September 16, 1988, wife filed a Motion for Reconsideration of the Superior Court's Order, taking the position that the fact that husband was personally served with the Petition and Summons while he was actually present in California was a sufficient basis for California to exercise *in personam* jurisdiction over husband and, further, that if it is a requirement of the exercise of *in personam* jurisdiction that husband have sufficient "minimum contacts" with California, the evidence presented to the California Superior Court established minimum contacts sufficient to support California's exercise of personal jurisdiction over husband (Doc. 12). In response to wife's Motion, husband filed a declaration that set forth certain contacts that he did not have with California but which did not controvert the facts set forth in wife's prior declaration (Doc. 15). On October 5, 1988, California Superior Court entered an Order denying husband's Motion to Quash in its entirety, finding that it "has jurisdiction, both *in rem* and *in personam*, over the subject matter and the parties, respectively" (JA 26). Husband then moved for reconsideration of the October 5, 1988, Order and, after receiving wife's legal Memorandum and Declaration In Response thereto and husband's reply and after hearing argument of counsel, the Superior Court issued an Order on October 31, 1988, denying husband's Motion for Reconsideration (JA 33).

On April 7, 1989, the California Court of Appeal denied husband's Petition for Writ of Mandate (JA 34-35) and, on June 8, 1989, the California Supreme Court denied husband's Petition for Review of the Court of Appeal decision.

SUMMARY OF ARGUMENT

The line of cases beginning with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) recognized that a non-resident defendant's "presence" is a traditional basis of *in personam* jurisdiction. Thus, California's exercise of jurisdiction over husband in this case is consistent with the "standards of International Shoe and its progeny" as referred to in *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977).

This case does not involve "transient presence" because, as the state of domicile of the wife and children, California has a substantial interest in and connection with the subject matter of this litigation and the substantial rights and interests of the wife and children are implicated. Further, over the course of a substantial period of time husband has established a pattern of regular and continuing visits to California in which he attends to his personal business and affairs as well as visiting with his children. Husband helped create the interstate family relationship which exists by fostering the relocation of his wife and children to California, knowing at the time that his marriage to wife was over, knowing that judicial proceedings to formalize that termination and resolve all of the incidental issues was contemplated but had not yet commenced and knowing that wife intended

to be the plaintiff in an "irreconcilable differences" divorce. Husband had "fair warning" of the possibility of his being haled before a California court both because he sent his wife and children to live in California before contemplated judicial proceedings had been initiated and because, prior to his traveling to Mill Valley, California where he was served with process in this action, he was informed by his New Jersey business partner that wife had initiated California proceedings and had set in motion the procedures required to effect service of process upon husband.

Husband's contacts and purposeful activities with and in the state of California are sufficient to support the exercise of *in personam* jurisdiction over him by that state. He makes frequent regular trips to California which began prior to his being served with process in wife's legal separation action and have continued subsequent to that time. During these various trips to California husband has availed himself of both public and private facilities in the state of California and has derived tax and other benefits from his California activities.

An evaluation and balancing of the various important interests that this Court has recognized as bearing upon the propriety of a state court's exercising jurisdiction over a non-resident defendant supports the exercise of jurisdiction in this case. California's interests in adjudicating the dispute and in the economic and emotional health, welfare and security of its domiciliaries are of substantial importance in this case as are the interests of the wife and children of obtaining a complete and expeditious resolution of all the family law issues in a convenient forum. Recognition of California's right to exercise

jurisdiction in this matter will foster the most efficient and orderly resolution of the issues presented and will advance substantive social policies relating to family law matters. At the same time exercise of jurisdiction will not result in any undue burden being placed upon husband, particularly where he has made no showing in the record of any actual burden on him and, in fact, has been able to participate quite substantially in the litigation of jurisdictional issues raised in this action.

Finally, a determination that California, as the domicile of one of the separated spouses, has jurisdiction to adjudicate all of the involved family law issues raised in this case is eminently reasonable under all of the facts and circumstances, particularly where husband has been served with process while present in California on one of his many trips to that state and where all of the requirements of procedural due process have been met.

ARGUMENT

CALIFORNIA STATUTORY JURISDICTION

Section 410.10 of the California Code of Civil Procedure empowers California courts to exercise jurisdiction on any basis or contact not denied them by the California or United States Constitutions. See California Judicial Council Comment to Cal. Code Civ. Proc. Section 410.10 (West 1973). The California statute permits its courts to exercise jurisdiction over an individual on one or more of several bases, including "Presence" and "Other relationships to the state which make the exercise

of judicial jurisdiction reasonable." Id. The California Judicial Council Comment further states:

> "Other recognized bases include: . . . (3) Judicial jurisdiction for divorce of persons one or both of whom are domiciled in this state or have such other relationship to this state as would make it reasonable for the state to dissolve their marriage. (4) Judicial jurisdiction over other proceedings relating to status, such as judicial separation, annulment, support, adoption, or custody, of persons who are domiciled or present in this state, or have such other relationships to this state as would make it reasonable for the state to hear and determine such action.
>
> * * *
>
> One basic principle underlies all rules of jurisdiction. This principle is that a state has power to exercise jurisdiction over a person . . . if the person's relationship to the state is such as to make the exercise of such jurisdiction reasonable under contemporary standards. (See, e.g., *International Shoe Co. v. State of Washington, supra*; Restatement (Second), [sec.] 24.) This relationship includes all physical and non-physical circumstances which may serve to link a person with a state."

DEVELOPMENT OF JURISDICTIONAL PRINCIPLES

In *Pennoyer v. Neff*, 95 U.S. 714 (1877) this court endorsed two "well established principles of public law respecting the jurisdiction of an independent State over persons and property." Those principles were (1) that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory and (2) that no State can exercise direct jurisdiction and authority over persons or property without its territory.

Mr. Justice Field, speaking for the Court, quoted from *Picquet v. Swan*, 5 Mas. 85, as follows:

> "Where a party is within a territory, he may justly be subject to its process, and bound personally by the judgment pronounced on such process against him."

Thus was born the now traditional rule that the physical "presence" of an individual defendant within the forum state when he is served with process is a proper basis for the exercise by that state of *in personam* jurisdiction over him.

Apparently, the first case in which this Court actually applied this jurisdictional rule in a true "transient presence" situation was in *Fauntleroy v. Lum*, 210 U.S. 230 (1908). During the next 68 years the courts

> "struggled to make the existing law responsive to a set of radically changed circumstances by relying on such twists, turns and legal fictions as they could muster. Thus, through artificial interpretations of "presence" and "consent", courts substantially expanded their powers over nonresidents until, as a pragmatic matter, a new set of principles emerged." Friedenthal, *A Comment On The Impact of Shaffer v. Heitner In The Classroom*, Vol. 1978 Washington U. L. Q. 319, 321 (1978)

See also Werner, *Dropping The Other Shoe: Shaffer v. Heitner And The Demise Of Presence-Oriented Jurisdiction*, 45 Brooklyn L. Rev. 565, 575. This Court equated incorporation within the state or maintaining its principal place of business within the state with corporate presence within the state and/or presumed consent to the state's jurisdiction. See Brilmayer et. al., *A General Look At General*

Jurisdiction, 66 Texas L. Rev. 721, 733-735 (1988). Other cases held that "doing business within the state" could be deemed "presence", thus providing a proper basis for exercising *in personam* jurisdiction over a non-resident corporate defendant. See *International Harvester Co. v. Kentucky*, 234 U.S. 579 (1914); *Philadelphia & Reading R. Co. v. McKibbin*, 243 U.S. 264 (1917).

Ultimately, in 1945 this Court issued its seminal opinion in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) in which it held that "due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' *Milliken v. Meyer*, 311 U.S. 457, 463, 85 L ed 278, 283, 61 S. Ct. 339, 132 ALR 1357." 326 U.S., at 316. This court thus expanded the basis upon which a state can exercise *in personam* jurisdiction over a non-resident defendant to include, in addition to the defendant's actual presence within the state, certain "minimum contacts" of the defendant with the forum state such that, when evaluated in terms of their "quality and nature . . . in relation to the fair and orderly administration of the laws" (326 U.S., at 319), the exercise of *in personam* jurisdiction will not offend "traditional notions of fair play and substantial justice." The very language used in *International Shoe* appears to establish that the Court recognized the defendant's *presence* within the state as a proper basis of jurisdiction and, further, recognized that other factors would also form a proper basis for the exercise of *in personam* jurisdiction, as a supplement to the presence basis.

Fourteen years later in *New York v. O'Neill*, 359 U.S. 1 (1959), this Court reaffirmed the principle that the actual, physical presence of an individual non-resident defendant within the forum state is a proper basis upon which that state can exercise *in personam* jurisdiction. Mr. Justice Frankfurter, speaking for the Court, stated: "However, the Florida courts had immediate personal jurisdiction over respondent by virtue of his presence within that State." 359 U.S., at 8-9.

During the next 30 years the opinions of this Court interpreting and applying the analytical framework adopted in *International Shoe* involved, for the most part, the attempt to exercise *in personam* jurisdiction over non-resident *corporate* defendants, which were served with process either constructively or personally outside the boundaries of the forum state. In the one case where the corporate agent was personally served within the boundaries of the forum state, this court upheld the exercise of *in personam* jurisdiction over the corporate defendant, even though the cause of action sued upon did not arise in the forum state and did not relate to the corporate defendant's activities in that state, because the corporation had been carrying on a continuous and systematic, though limited, part of its general business in the forum state. The court stated:

> "Today if an authorized representative of a foreign corporation be physically present in the state of the forum and be there engaged in activities appropriate to accepting service or receiving notice on its behalf, we recognize that there is no unfairness in subjecting that corporation to the jurisdiction of the courts of that state

> through such service of process upon that representative." *Perkins v. Benguet Consolidated Mining Co.*, 342 U.S. 437, 444 (1952).

In 1957, the Court seemed to recognize and confirm that the holding in *International Shoe* was intended to supplement and expand the traditional "presence" basis of jurisdiction to cover certain non-resident defendants who were not present, when the court stated:

> "Since Pennoyer v. Neff, 95 U.S. 714, 24 L ed 565, this Court has held that the Due Process Clause of the Fourteenth Amendment places some limit on the power of state courts to enter binding judgments against persons not served with process within their boundaries." *McGee v. International Life Ins. Co.*, 355 U.S. 220, 222 (1957).

The court noted that there was a clearly discernable trend toward expanding the permissible scope of state jurisdiction over foreign corporations and other non-residents. In *McGee* the contacts were indeed minimal but the Court upheld the exercise of *in personam* jurisdiction over the non-resident corporate defendant on a finding of a "substantial connection" between the contract which was the basis of the suit and the forum state (355 U.S., at 223).

In *Hanson v. Denckla*, 357 U.S. 235 (1958), the court refused to uphold the exercise of *in personam* jurisdiction over the corporate trustee and other non-residents because those defendants did not have the requisite "minimal contacts" with the forum state and because the case did not involve "some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S., at 253.

In *Shaffer v. Heitner*, 433 U.S. 186 (1977) this court issued ar opinion that forms the basis of husband's challenge to the exercise of California jurisdiction over him in this case. *Shaffer* technically involved an exercise of *quasi in rem* jurisdiction; indeed, a particularly harsh form of *quasi in rem* jurisdiction. See Karst, *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 151, 158, n. 36. Due to the unusual and harsh provisions of the Delaware statutory provision upon which jurisdiction was asserted, the case really involved a disguised assertion of personal jurisdiction over the absent non-resident defendants. Important to the Court's analysis was the fact that the express purpose of the Delaware statute was to compel the defendant to enter a personal appearance, in that Delaware law precluded any defense on the merits unless the defendant entered a general appearance "thus submitting to full in personam liability." 433 U.S., at 209, n. 33. The Delaware Supreme Court had interpreted the sequestration statute as not permitting the defendant to appear specially and defend on the merits with liability limited to the value of the seized property. See *Sands v. Lefcourt Realty*, 35 Del. Ch 340, 117 A. 2d 365 (1955). Given the fact that *Shaffer*, in effect, involved personal jurisdiction over the non-resident defendants, the notion that the standards set forth in *International Shoe* and its progeny should be applied is not startling.

In the context of the foregoing development of the law, the questions to be resolved in the instant case are (1) whether the standards of *International Shoe* and its progeny are to be applied in evaluating California's exercise of *in personam* jurisdiction over husband under the facts of this case and, (2) if so, (a) what are those standards and

(b) do they support the exercise of *in personam* jurisdiction over husband under the facts of this case?

THE FACTS OF THIS CASE DO NOT PRESENT AN ISSUE OF "TRANSIENT PRESENCE"

Professor Ehrenzweig has defined the "transient rule" of personal jurisdiction as the exercise of *in personam* jurisdiction over an individual non-resident defendant based solely upon service of process upon that defendant when he or she is physically present within the forum state, where neither the plaintiff nor the defendant resides in the forum state and the forum state has no connection with the cause of action. See Ehrenzweig, *The Transient Rule of Personal Jurisdiction: The "Power" Myth and Forum Conveniens*, 65 Yale L.J. 289 (1956). The facts of this case do not fit within such "transient rule" especially because California is the state of domicile of the wife and children.

Certainly California has a "connection" with the subject matter of the litigation based upon that domicile. Further, under the facts of this case, husband's presence in California has not been transitory, fleeting, momentary, casual, or fortuitous. Wife testified in a sworn declaration that husband made at least one trip to California every year during the eleven years that the parties were married prior to their separation, except for one year. Prior to the California trip during which husband was served in January of 1988, he had made at two visits to California of substantial duration in which he attended to his

personal business and affairs and in which he also took the opportunity to visit with his children. During the January 1988 trip to California, he traveled directly from New Jersey to Los Angeles where he spent several days attending to business and visiting relatives. Then, prior to returning to New Jersey, he traveled to the San Francisco Bay Area where he both visited with his children and conducted some business.

HUSBAND'S "PRESENCE" IN CALIFORNIA UNDER THE EVIDENCE IN THIS CASE IS A PROPER BASIS UPON WHICH CALIFORNIA MAY EXERCISE IN PERSONAM JURISDICTION OVER HIM

Although the "presence" basis of asserting *in personam* jurisdiction has engendered a virtual maelstrom of criticism, it has not been without its supporters. See Maltz, *Sovereign Authority, Fairness And Personal Jurisdiction: The Case For The Doctrine Of Transient Jurisdiction*, 66 Washington U. L. Q. 671 (1988); Glen, *An Analysis Of "Mere Presence" And Other Traditional Bases Of Jurisdiction*, 45 Brooklyn L. Rev. 607 (1979). In any case, whether "mere" presence is a sufficient basis for the exercise of *in personam* jurisdiction or whether presence is always sufficient need not be decided in this case.

Husband was not served with the California Petition and Summons by surprise or chance. Prior to traveling to the San Francisco Bay Area and while still in Southern California, husband learned from his business partner that wife had filed a California Petition and that the partner had accepted service in husband's behalf. Thus, husband had fair warning, prior to his trip to Mill Valley, California, that wife had initiated California proceedings

and that he might very well be served. Subsequent to his being served in January of 1988, husband has continued his regular trips to California to attend to his own personal and business affairs, and to visit his children (JA 18-20; 27-28).

The California Judicial Council Comment to Section 410.10 of the California Code of Civil Procedure states, in part: "A state has power to exercise judicial jurisdiction over an individual who is physically present within its territory, whether permanently or temporarily, if at that time he is properly served with process." One can be "temporarily" present without his presence being transitory, momentary or fortuitous. Under the facts of this particular case, husband was present in California temporarily on several distinct but regular occasions. If a categorical rule that presence is, *per se*, a proper basis for the exercise of jurisdiction has the potential to lead to unfair results or abuses, then an equally categorical rule that presence is never a sufficient basis to support the exercise of jurisdiction, without a consideration of all the facts and circumstances of the case, is similarly unfair. Even the proposed revisions to Restatement of the Law, Second, Conflict of Laws, Section 28, do not suggest that presence be abrogated as a proper basis of the exercise of *in personam* jurisdiction, but simply propose that a state has the power to exercise jurisdiction over an individual who is present within its territory *unless* his relationship to the state "is so attenuated as to make the exercise of such jurisdiction unreasonable." This is consistent with the California Judicial Council Comment provision that judicial jurisdiction may be exercised over an individual on the bases of presence and "other relationships to the

state" which make its exercise "reasonable." Comment b to Section 28 of the Restatement suggests that jurisdiction would be appropriate if "there is some connection between the state and the particular transaction involved" or if there is some "special circumstance" that makes the exercise of jurisdiction reasonable. It is suggested that the facts of this case do involve such a "connection" and "special circumstance" in that California is the state of domicile of the wife and children and has an interest in the subject matter of the litigation. Further, husband helped create the "California connection" with this litigation and has created his own relationship with California by his own affirmative acts. Also, it has been observed, presence will often signal other relationships with the forum and the litigation which will be adequate to support the exercise of jurisdiction. (See von Mehren and Trautman, *Jurisdiction To Adjudicate: A Suggested Analysis*, 79 Harv. L. Rev. 1121, 1137 (1966); Karst, *supra*, 91 Harv. L. Rev. at 160; Bernstine, *Shaffer v. Heitner: A Death Warrant For The Transient Rule Of In Personam Jurisdiction*, 25 Vill. L. Rev. 38, 62 (1979). The presence of a non-resident defendant in the forum state when he is personally served with process has been a traditional basis for the exercise of *in personam* jurisdiction over that defendant for more than a century. Any harshness in the "presence" rule can be ameliorated in a proper case where such facts and circumstances obtain by a decision imposing appropriate limitations on the rule. There is nothing about the facts of this case that show any harshness such that should lead the Court to abandon that traditional rule of judicial jurisdiction. Instead, it is respectfully submitted, it is appropriate for this Court to reaffirm the

traditional rule that the actual physical presence of a non-resident individual defendant within the forum state, when he is personally served with process, is a sufficient basis for the exercise of *in personam* jurisdiction over him, as long as under all of the facts and circumstances of the case the exercise of such jurisdiction is reasonable. As shall presently be shown, the exercise of jurisdiction over husband under the facts and circumstances of this case is reasonable.

EXERCISE OF IN PERSONAM JURISDICTION OVER HUSBAND IN THIS CASE COMPLIES WITH THE "FAIR PLAY AND SUBSTANTIAL JUSTICE" STANDARD SET FORTH IN INTERNATIONAL SHOE

A defendant's "presence" is a basis for exercising *in personam* jurisdiction under the opinion in *International Shoe* and thus meets the "standards set forth in *International Shoe* and its progeny." (*Shaffer v. Heitner, supra*, 433 U.S., at 212). That *International Shoe* and its progeny intended to supplement rather than replace "presence" as a jurisdictional basis by setting up an alternative methodology for establishing jurisdiction over non-resident defendants who are "not present" within the forum state is illustrated by the opinions of this Court in *New York v. O'Neill, supra*, and *McGee v. International Life Ins. Co., supra*. In *McGee* the Court emphasized the limit imposed by the Fourteenth Amendment on state court power to enter binding judgments against "persons not served with process within their boundaries." 355 U.S., at 222. Subsequent to its opinion in *International Shoe* this Court has twice upheld jurisdiction over non-resident defendants who were present within the forum state and has

never rejected jurisdiction over a present defendant. See *Perkins v. Benguet Mining Co., supra,* and *New York v. O'Neill, supra.*

Regardless whether the exercise of jurisdiction over husband can be sustained on the basis of the foregoing arguments, it is respectfully submitted that California's exercise of jurisdiction under the facts of this case meets the "standards set forth in International Shoe and its progeny." *Shaffer v. Heitner, supra,* 433 U.S., at 212. That *Shaffer's* reference to the "standards" of *International Shoe* and it's progeny was a reference to "traditional notions of fair play and substantial justice" seems clear from the following statements in *Shaffer*:

> "We think that the time is ripe to consider whether the standard of fairness and substantial justice set forth in *International Shoe* should be held to govern actions in rem as well as in personam." 433 U.S., at 206.
>
> "The case for applying to jurisdiction *in rem* the same test of 'fair play and substantial justice' as governs assertions of jurisdiction *in personam* is simple and straightforward." 433 U.S., at 207.
>
> "We believe, however, that the fairness standard of *International Shoe* can be easily applied in the vast majority of cases." 433 U.S., at 211.

International Shoe inaugurated the "minimum contacts" methodology as a way of analyzing whether the exercise of jurisdiction over the defendant in that case was concomitant with concepts of fair play and substantial justice. *McGee v. International Life Ins. Co., supra,* also followed this methodology and in addition held that the acts of defendant in mailing to the insured in California a contract having a "substantial connection with that State"

(355 U.S., at 223) and accepting premium payments mailed to it by the insured from California were contacts which, while minimal, were sufficient to support the exercise of *in personam* jurisdiction over the non-resident defendant.

Hanson v. Denckla, supra, introduced to the jurisdictional inquiry the concept of "affiliating circumstances" (357 U.S., at 246) without which the courts of a state may not exercise *in personam* a jurisdiction over a non-resident defendant. In determining whether a defendant has "sufficient affiliation" (357 U.S., at 250) with the forum state, "it is essential . . . that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws." 357 U.S., at 253.

Shaffer, itself, after noting that "Mechanical or quantitative evaluations of the defendant's activities in the forum could not resolve the question of reasonableness" suggested that "the relationship among the defendant, the forum, and the litigation" (433 U.S., at 204) should be the central concern of the inquiry into whether it is fair and reasonable to exercise personal jurisdiction over the non-resident defendant. Thus were the "minimum contacts" methodology set forth in *International Shoe* and *McGee,* and the "affiliating circumstances" and "purposeful availment" analysis employed in *Hanson v. Denckla* recognized in *Shaffer.* Each of these analytical concepts or methodologies has as its goal the determination of the fairness, justness, and reasonableness of exercising personal jurisdiction under the particular facts of each case.

The post-*Shaffer* opinions of this Court have continued the development of analytical techniques designed to determine whether it is fair and reasonable for a state to exercise personal jurisdiction over a given defendant in a particular factual setting. Thus, in *Kulko v. California Superior Court*, 436 U.S. 84 (1978) this Court, for the first time, applied the foregoing analytical framework of the *International Shoe* line of cases and stated that the existence of personal jurisdiction over the defendant depends on "a sufficient connection between the defendant and the forum State as to make it fair to require defense of the action in the forum." 436 U.S., at 91. Further, the Court acknowledged that "the interests of the forum State and of the plaintiff" are relevant considerations although "an essential criterion in all cases is . . . the 'quality and nature' of the defendant's activity . . . ." 436 U.S., at 92.

In *World-Wide Volkswagen v. Woodson*, 444 U.S. 286 (1980) this court refused to approve the exercise of *in personam* jurisdiction over the non-resident defendants because "we find in the record before us a total absence of those affiliating circumstances that are a necessary predicate to any exercise of state-court jurisdiction. [Defendants] carry on no activity whatsoever in Oklahoma. . . . They avail themselves of none of the privileges and benefits of Oklahoma law." 444 U.S., at 295. The court nourished the broadening analytical framework of the jurisdictional inquiry, noting that, while the burden on the defendant is always a primary concern, it will be considered in light of other relevant factors. Such factors include the forum state's interest in adjudicating the dispute; the plaintiff's interest in obtaining convenient and effective relief; the interstate judicial system's interest in

obtaining the most efficient resolution of controversies; and the shared interest of the several states in furthering fundamental substantive social policies. 444 U.S., at 292. The factors set forth in *World-Wide Volkswagen* were reiterated in *Burger King*, 471 U.S., at 477; and in *Asahi Metal Industry Co. v. Superior Court*, 480 U.S. 102, 113 (1987). The Court further noted that *International Shoe* stressed that the Due Process Clause insures not only fairness, but also the "orderly administration of the laws." 444 U.S., at 294. Foreseeability also is a relevant consideration; that is, whether "the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there." 444 U.S., at 297.

In *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) the court reiterated its prior suggestions that the relationship among the defendant, the forum and litigation is an important focus of inquiry. 465 U.S., at 775. The opinion in *Keeton* also placed significant importance on the forum state's interest in holding the defendant answerable where a non-resident defendant engages in activities "relating to" the forum state. 465 U.S., at 776. The fact of plaintiff's residence in the forum state is also a relevant factor to be considered. "That is, plaintiff's residence in the forum may, because of defendant's relationship with the plaintiff, enhance defendant's contacts with the forum. Plaintiff's residence may be the focus of the activities of the defendant out of which the suit arises." 465 U.S., at 780.

The court has also recognized, in the post-*Shaffer* world, that it is fair and reasonable to permit a state to exercise *in personam* jurisdiction over a non-resident defendant where the defendant has "fair warning" that a

particular activity may subject him to the jurisdiction of the forum state and he nevertheless goes forward with such activity in spite of the fair warning. See *Burger King v. Rudzewicz*, 471 U.S. 462, 472; *Shaffer v. Heitner, supra*, 433 U.S., at 218 (Stevens, J., concurring). The "fair warning" requirement is satisfied if the defendant has purposefully directed his activities at residents of the forum state. *Burger King, supra*, 471 U.S., at 472; *Keeton, supra*, 465 U.S., at 774.

Thus it is clear that *Shaffer* and the opinions that came later, although they may not expand the circumstances in which state court jurisdiction may be exercised, do expand the analytical techniques employed by this court to determine, in a given factual setting, whether the exercise of jurisdiction is fair and reasonable.

AN EVALUATION OF HUSBAND'S CONTACTS AND PURPOSEFUL ACTIVITIES IN OR AFFECTING CALIFORNIA SUPPORTS THE EXERCISE OF JURISDICTION OVER HIM

The evidence adduced before the California courts indicates that, during the ten year period immediately preceding the commencement of wife's California legal separation action, husband regularly visited California at least once each year. Further, a few months before he was served with wife's Petition and Summons in the California proceedings, he had commenced a pattern of more frequent regular trips to California and he has continued that pattern of continuing visits to California after having been so served. During those visits he has visited with his sister and her family, he has attended business functions and engaged in other business related activities (even

conducting at least one business seminar in California in October 1987), and he has taken advantage of entertainment and tourist attractions and public facilities in California. Husband has testified that he has derived tax benefits from his activities in California and it can be reasonably inferred that he has derived other business benefits from his business functions and activities. It is clear that he has reaped benefits from the use of California's airport facilities, highways, hotels and restaurants. California is not just "any state" where husband was served.

Nor is jurisdiction predicated merely upon husband's presence in California when he was served, but is based upon all of his various activities in California while he was present in that state on various regular occasions as well as upon California's connection with this litigation. Although husband attempts to characterize his business activities in California as events he "simply arranged to attend" (Petitioner's Brief, p. 46) when he was coming to visit his children, the evidence in this case suggests otherwise. That evidence shows that husband began his habit of coming to California to attend business related seminars and functions many years before his family broke up (JA 28). The evidence further shows that in October of 1987 husband apparently spent a full week in California attending to business, visiting with his children only on the two weekends before and after that week of business activities (JA 18). Further, in January of 1988 husband spent several days in Southern California on business before finally traveling to the San Francisco area to visit his children on the weekend before flying home to New Jersey (JA 18-19). Perhaps the most accurate perspective

on husband's business activities in California is best established in his letter dated December 12, 1987, written in his own hand, informing wife of his plans to be in California in the ensuing months.[2] By way of example, this letter shows that husband's plans during January 1988, when he was served with process in wife's action, were to attend to his business affairs for a full two week period surrounding the weekend visitation with his children.

Although husband argues that his business activities in California should not be included in evaluating his "contacts" with California for jurisdictional purposes in this case, the evidence shows that on virtually all of his trips to California he has combined the several purposes of visiting his children, conducting business activities and, at least sometimes, visiting with other relatives. Thus, when one looks at husband's trips to California from the perspective of practical reality, one sees that there were not separate trips for business and personal purposes, on the one hand, and for visitation, on the other. Thus, it is not appropriate to try to separate or categorize husband's various California activities and to fit them into distinct pigeon holes. What is significant about husband's activities in California, it is respectfully

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[2] This letter is included in the record in this case although it is not included in the Joint Appendix. It is Exhibit H to wife's Affidavit dated May 17, 1988, which was filed in the New Jersey proceedings and attached and incorporated by reference in wife's Declaration in the California proceedings dated June 23, 1988, Doc. 6 in the Chronological List of Relevant Docket Entries in the Joint Appendix. For the Court's convenience the full text of this letter is set forth in Appendix II of this Brief.

suggested, is that they establish his frequent "presence" on several different occasions and the lack of any real burden on him of requiring him to litigate the family law issues in California. Such presence shows that husband did engage in affirmative activities by which he purposefully availed himself of the privilege of conducting activities within the state of California, pursuant to which he invoked the benefits and protections of its laws and it establishes minimum contacts with California which "may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice' *International Shoe Co. v. Washington*, 326 U.S., at 320, 90 L Ed 95, 66 S. Ct. 154, 161 ALR 1057." *Burger King Corp. v. Rudzewicz, supra*, 471 U.S., at 476. Those other factors include the lack of burden on husband, California's interest in adjudicating the dispute, wife's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of the controversy, and the shared interest of the states in furthering fundamental substantive social policies. "These considerations sometimes serve to establish the reasonableness of jurisdiction upon a lesser showing of minimum contacts than would otherwise be required." *Burger King, supra*, 471 U.S., at 477.

There are some situations in which one's relationship to or activities in the forum state, even though not always directly related to the subject matter of the litigation, may be sufficient to support the exercise of jurisdiction. See Brilmayer, *General Jurisdiction, supra*, 66 Texas L. Rev. at 741-743. Even though some of husband's activities in California do not relate directly to the subject matter of

the legal separation action, they do implicate the police powers and public facilities of that state. Those activities seem certainly to be relevant to the questions of convenience and reasonableness and, it is submitted, it is not unreasonable to allow California to exercise jurisdiction over husband where other relevant factors support the exercise of jurisdiction. By virtue of husband's presence and activities in California on various specific occasions, the Privileges and Immunities Clause of Article IV of the United States Constitution requires California to grant him a variety of rights, including the right to protection of the law and the right of access to the state courts. Thus, husband has voluntarily associated himself with California and has placed himself fully within the protection of California laws and within the sovereign authority of that state. See Maltz, *supra*, 66 Washington U.L.Q., at 698.

Husband consented to, and actively participated in, the establishment of a California domicile for his wife and children, knowing that he would have a continuing relationship with his wife and children after they had established their California domicile, knowing that his marriage to wife was being terminated and knowing that judicial proceedings to formalize that termination and adjudicate all the legal issues incident thereto were contemplated but had yet to be commenced. There is evidence in the record in this case that, prior to husband's assisting his wife and children in their move to California, he and wife had agreed that wife would be the plaintiff in divorce proceedings based on the ground of "irreconcilable differences."

All of the foregoing virtually compels the conclusions that husband engaged in affirmative actions by which he

purposely availed himself of the privilege of conducting activities in the state of California and invoked the benefits and protections of California law, that he participated in creating a situation which inevitably resulted in a relationship among husband, California, and the litigation, and that he should reasonably have foreseen or anticipated his being haled before a California court. The activities of husband in and relating to California are not random, fortuitous or attenuated. His contacts with California result directly from his own actions that created a "substantial connection" with that state. See *Burger King Corp. v. Rudzewicz, supra,* 471 U.S., at 475. "[W]here a defendant who purposefully has directed his activities at forum residents seeks to defeat jurisdiction, he must present a compelling case that the presence of some other considerations would render jurisdiction unreasonable." Id, at 477.

AN EVALUATION OF THE INTERESTS INVOLVED IN THIS CASE SUPPORTS THE EXERCISE OF *IN PERSONAM* JURISDICTION OVER HUSBAND

> "[T]he time has come to slough off the ritualistic classifications through which judges still feel bound to think their hard way to realistic decisions.
>
> "Why should they not be free to consider jurisdiction at the outset in the complex of the parties' contacts with the forum state, the interests of the state concerned in the outcome, and a pervading concept of fair play to all parties?" Traynor, *Is This Conflict Really Necessary?*, 37 Texas L. Rev. 657, 660 (1959).

This Court has rejected "talismanic jurisdictional formulas." *Burger King, supra,* 471 U.S. at 485. The reasonableness of the exercise of jurisdiction over a non-resident defendant depends in each case on an evaluation of several factors, including the interests of the forum state, the interests of the plaintiff, the interest of the interstate judicial system in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *World-Wide Volkswagen, supra,* 444 U.S., at 292; *Burger King, supra,* 471 U.S., at 477; *Asahi Metal Industry Co., Ltd., supra,* 489 U.S., at 113. The Due Process Clause of the Fourteenth Amendment insures not only fairness, but also the "orderly administration of the laws." *International Shoe, supra,* 326 U.S., at 319; *World-Wide Volkswagen, supra,* 444 U.S., at 294.

The forum state's interest in adjudicating the dispute is "unquestionably important", *Kulko v. California Superior Court, supra,* 436 U.S., at 98, and the plaintiff's interest in obtaining a convenient and effective forum are both important factors to be considered. *World-Wide Volkswagen, supra,* 44 U.S., at 292; *Keeton v. Hustler Magazine, supra,* 465 U.S., at 776; *Shaffer v. Heitner, supra,* 433 U.S., at 208. The fact that plaintiff is a resident of the forum state may be an important factor in the jurisdictional inquiry and may enhance the defendant's contacts with the forum since plaintiff's residence may be the focus of the defendant's activities relating to the forum state. *Keeton v. Hustler Magazine, Inc.,* 465 U.S., at 780. Indeed, plaintiff's contacts with the forum state may be so manifold that they will permit the exercise of jurisdiction over a non-

resident defendant when a jurisdictional basis might otherwise be lacking. *Calder v. Jones,* 465 U.S. 783, 788 (1984).

California not only has an interest in providing a forum and a procedure in this litigation, it also has an interest in the outcome which, particularly regarding the custody, support and property division issues, will have a profound effect upon its domiciliaries. The Due Process Clause of the Fourteenth Amendment should not be construed as depriving the forum state of the power to protect its citizens in their dealings with non-resident defendants simply on the ground that it would be more "convenient" for the defendant to be sued somewhere else. See *International Shoe, supra,* 326 U.S., at 323, 325. Jurisdictional rules may not be employed in such a way as to make litigation so gravely difficult and inconvenient that a party is at a severe disadvantage in comparison to her opponent. *Burger King, supra,* 471 U.S., at 478.

Can it be doubted that California, as the state of domicile of the wife and children, has a special interest in providing a forum and adjudicating the issues presented in this litigation? California has asserted its interest and New Jersey, the state of husband's domicile as well as the state of the prior marital domicile, has deferred to California, not just on a technicality of New Jersey law but in express recognition of California's legitimate interests. A fair reading of the New Jersey Superior Court decision (Doc. 12, Exhibit "A" pp. 6-10) shows, and the Appellate decision confirms, that New Jersey's deference to California was not limited to considerations under the Uniform Child Custody Jurisdiction Act. The New Jersey decisions appear to reflect that state's belief that the most efficient resolution of the issues will be in California and that

referring husband to a California forum will advance the substantive social policy of not fostering fraud, duress and undue influence in the negotiating of marital settlement agreements. This Court has also emphasized that "jurisdiction may not be grounded on a contract whose terms have been obtained through fraud, undue influence, or overweening bargaining power" . . . . *Burger King, supra,* 471 U.S., at 486.

What is efficient or "orderly" about allowing California to determine the marital status of husband and wife and to resolve custody issues, but then to require the parties to travel all the way across the country to litigate other issues presented by this litigation. Surely California has a strong interest in promoting a fair division of the marital property and in adjudicating issues relating to the support of its domiciliaries and keeping them off the public assistance registers. In that regard, it appears that California's interests may well be greater than New Jersey's. In asserting jurisdiction over husband, California cannot be accused in meddling in a dispute that does not concern it. California certainly has substantial interest in the economic and emotional health, welfare and security of its domiciliaries. See *Crouch v. Crouch,* 28 Cal.2d 243, 251, 169 P.2d 897 (1946).

The substantial interests of the wife and children are also implicated here. Clearly they have a legitimate interest in obtaining a convenient forum for the complete and expeditious resolution of the important issues that affect their lives. They have an interest in obtaining a stable and nourishing home environment which would be severely impaired if wife is required to shuttle between California and New Jersey to litigate some of the issues involved in

this case. As long as there is a real nexus between the circumstances giving rise to this litigation and the state of California and where the litigation involves the substantial interests of the wife and children, California should be deemed to have a sufficient interest in the litigation to permit it to exercise *in personam* jurisdiction over husband. Such a result would foster the orderly administration of the laws and the efficient resolution of the controversy, as well as fostering fundamental social policies.

EXERCISE OF JURISDICTION IN THIS CASE WILL NOT IMPOSE AN UNREASONABLE BURDEN ON HUSBAND

Although the burden on the defendant is a primary concern of the jurisdictional inquiry, that burden, to the extent that it actually exists, is to be considered in light of the other relevant factors previously set forth herein. Moreover, the burden on the defendant must be a real one. The courts should not allow abstract theoretical considerations to blind them to the factual realities of each case.

Husband has made no showing in the record in this case of any actual burden on him of having to litigate this matter in the courts of California. The truth is that he has participated quite substantially in the litigation of the jurisdictional dispute, by special appearance, without ever actually attending any of the several hearings. He has also engaged in a continuing pattern of regular visits to California over a substantial period of time and has derived significant tax and other benefits from those trips. Clearly, he can (and undoubtedly will) continue to

make his frequent trips to California to visit relatives, to engage in various business activities, to visit his children and to participate in this litigation without suffering any inconvenience or burden that rises to the level of being unreasonable. Inconvenience to the defendant does not necessarily amount to the denial of due process. *McGee v. International Life Ins. Co., supra,* 355 U.S., at 224; *Burger King Corp. v. Rudzewicz, supra,* 471 U.S., at 486. When a connection has been established between the defendant and the forum, often the interests of the plaintiff and the forum in the exercise of jurisdiction will justify even serious burdens on the defendant. *Asahi Metal Industry Co., Ltd. v. California Superior Court, supra,* 480 U.S. at 114.

However it may have been in former times, modern technological means of transportation and communication have greatly lessened the burden on a non-resident husband if he is required to litigate family law issues in the state of domicile of his wife and children. This truth was recognized even decades ago (see e.g. *Hanson v. Denckla, supra,* 357 U.S., at 250, 251), long before the inauguration of the "Express Mail" service of the United States Postal Service, the proliferation of overnight courier services, and the general use and availability of facsimile machines. This technological progress in transportation has also resulted in the increased mobility of the citizens of the several States. It is respectfully submitted that modern technological realities today provide a sound reason for moving the jurisdictional inquiry away from a focus on geographical distances and boundaries and physical contacts to an evaluation and balancing of the substantial relevant interests of the parties and the involved states. See McDougal, *Judicial Jurisdiction: From A Contacts to an Interest Analysis,* 35 Vand. L. Rev. 1 (1982).

In contrast to the minimal inconveniences and burdens upon husband, which might be occasioned by the exercise of California jurisdiction over him, the inconveniences and burdens that would be suffered by the wife and children, if wife is required to litigate the marital issues other than status and custody in New Jersey, are substantial. The children are still of young and tender years (the record indicates that young Ari until recently continued to nurse) and need the constant presence of their full-time custodian and care giver. Clearly, on the record in this case, husband has a higher level of mobility than wife and has established the habit of traveling to California on a regular continuing basis. His resources and the financial benefits he is able to derive from his travels to California make it substantially more fair and reasonable to require him to do whatever traveling may be required by this litigation than to place the burden and inconvenience of periodic travel upon the wife and children.

CALIFORNIA SHOULD BE PERMITTED TO EXERCISE IN PERSONAM JURISDICTION OVER HUSBAND ON THE BASIS THAT IT IS THE STATE OF DOMICILE OF WIFE AND CHILDREN

"Conflicts arising out of family relations raise problems and involve considerations very different from controversies to which debtor-creditor relations give rise. Such cardinal differences in life are properly reflected in law." *New York ex rel. Halvey v. Halvey,* 330 U.S. 610, 616

(1947) (Frankfurter, J., concurring). In criticizing the presence basis of jurisdiction, even Professor Posnak, who coined the phrase "Gotcha" theory of judicial jurisdiction, has recognized that the jurisdictional issues in family law cases should perhaps be treated differently than those in ordinary commercial cases. See Posnak, *A Uniform Approach To Judicial Jurisdiction After World-Wide And The Abolition Of The "Gotcha" Theory*, 30 Emory L. J. 729, n. 4. Indeed, this Court has, traditionally, treated jurisdictional issues in family law cases differently from jurisdictional issues in ordinary commercial litigation. Thus, it is established constitutional law that the state of domicile of either spouse has jurisdiction to alter the marital status, even *ex parte*, including cases in which it could not adjudicate the property interests affecting the absent spouse where constitutional requirements for the exercise of *in personam* jurisdiction over that spouse had not been met. See *Williams v. North Carolina*, 317 U.S. 287 (1942); *Estin v. Estin*, 334 U.S. 541 (1948); *Vanderbilt v. Vanderbilt*, 354 U.S. 416 (1957).

As noted previously, in *Kulko v. California Superior Court, supra*, this court, for the first time, applied the analytical framework developed in *International Shoe* and its progeny to a family law case. In *Kulko*, the husband and wife separated after some 13 years of marriage and wife moved from New York, the marital domicile, to California. After they had separated, the parties entered into a separation agreement and the wife flew back to New York to finalize and sign the agreement. Immediately thereafter she flew to Haiti and obtained a divorce decree which incorporated the terms of the agreement. She then returned to her home in California and husband,

wife and their children settled into their new marital, custodial, support and property relationships based upon the settlement agreement and the divorce decree. The children continued to reside in New York in the custody of their father and enjoyed visitation with their mother in California, all as provided under the decree and agreement.

Subsequently, after the custody arrangements had been changed by mutual agreement and both children had taken up residence in California with their mother, wife initiated California proceedings wherein she sought to establish the prior divorce decree as a California judgment and to modify the judgment to award her full custody of the children and to increase husband's child support obligations. Husband was not personally served in California with process relating to wife's California proceedings. Indeed, it appears from this Court's opinion that Mr. Kulko had never set foot within the state of California subsequent to the date that he and his former wife were married more than 15 years earlier during a brief stopover in California when he was en route to a tour of military duty in Korea; not even, apparently, during the two year period between the time that his daughter moved to California to live with her mother and the wife instituted the California custody and support proceedings. In fact, husband had apparently been within the state of California only twice in his life, both times during brief military stopovers on his way to and from his military assignment in Korea. Thus, husband's earlier visits to California were fleeting (this court characterized them as "glancing" 436 U.S., at 92), fortuitous and remote

in terms of time and purpose from the family law litigation.

What is significant about *Kulko* is not so much its result of precluding California from exercising jurisdiction over Mr. Kulko under the particular facts and circumstances of that case, as its weighing of those facts and circumstances and its evaluation of the relevant interests and of the quality and nature of the defendant's activities in determining whether the requisite "affiliating circumstances" between the defendant and the forum state were present to a degree sufficient to support the exercise of *in personam* jurisdiction over him. Where the family members had settled comfortably into their new family relationships based upon the prior settlement agreement and divorce decree and where, for some four years, they had all been living their lives under the rules set forth [illegible] decree and agreement, there is nothing surprising or unfair about requiring the party who desires to change those established, judicially confirmed rules of the relationship to bear the burden of whatever inconvenience or expense might result from such post-decree judicial proceedings which were necessary to adjudicate the issues relating to such proposed changes. It is in this context that this Court stated in *Kulko* that "basic considerations of fairness point decisively in favor of appellant's State of domicile as the proper forum for adjudication of this case, whatever the merits of appellee's underlining claim. It is appellant who has remained in the State of the marital domicile, whereas it is appellee who has moved across the continent." 436 U.S., at 97. Also of significance was the fact that the procedures available under the Revised Uniform Reciprocal Enforcement of Support Act of 1968,

permitted the parties to litigate the issues relative to child support without either of them having to leave their state of residence. 436 U.S., at 98-99.

In a post-decree situation like *Kulko*, the original state has a judicial history and record regarding the case. In a case like the present, where no prior adjudication of any issues related to the marital separation has occurred, the judicial slates are clean.

This case involves facts which are very different from the facts in *Kulko* and, thus, call for a different result. Here, husband was personally served with process while he was physically present in California. Moreover, his presence on that occasion and on several other occasions, both before and after service of process on him, can in no sense be characterized as "fleeting", "transitory" or "fortuitous." His presence in California on those several occasions has been both contemporaneous and connected with the litigation commenced by the filing of wife's California Petition. In view of the fact that husband sent his wife and children to their new home in California (this is a fair characterization of the situation in that husband controlled the family funds, purchased the airline tickets that were necessary for his wife and children's transit to California and drove them to the airport on the date of their departure) when he knew that he and wife had mutually agreed to separate, that judicial proceedings were contemplated to resolve the issues incident to that separation and that wife desired to be the plaintiff in divorce proceedings based on the ground of "irreconcilable differences", California's exercise of jurisdiction over him in this case does not offend traditional notions of fair play and substantial justice. To conclude that husband

could not have reasonably anticipated being haled into court in California under the circumstances is to blink at reality. At all relevant times husband was being advised by an attorney as to the family law issues and is presumed to know the law. The law in this country for more than a century has been that service of process upon a non-resident defendant, when he is physically present within the territory of the forum state, is a sufficient basis upon which that State can exercise *in personam* jurisdiction. In fact, the record in this case establishes that husband knew, before he traveled from Los Angeles to Mill Valley, California, in January of 1988, that wife had initiated California separation proceedings and had set in motion procedures to have husband served with process relating to those proceedings. Having actual knowledge of those facts, husband proceeded with his trip to Mill Valley, assumed the risk of being served and, in fact, was personally served with the Petition and Summons. In addition to these facts, wife has previously set forth facts to show that, unlike Mr. Kulko, husband, in the present case, has himself engaged in affirmative activities by which he has " 'purposefully availed' himself of the 'benefits and protections' of California's laws. See *Shaffer v. Heitner*, 333 U.S., at 216, 53 L Ed 2d 683, 97 S. Ct. 2569." *Kulko*, 436 U.S., at 94.

The facts of this case also present a situation which has not previously been presented to this Court in other family law cases such as *Williams v. North Carolina, supra, Estin v. Estin, supra, Vanderbilt v. Vanderbilt, supra,* and *Sherrer v. Sherrer*, 334 U.S. 343 (1948). Here, husband has been personally served with the Petition and Summons in the forum state, has actual notice of the proceedings and,

in fact, has availed himself of the opportunity of being heard in the California courts on the jurisdictional issue. Thus, it is respectfully suggested, this case presents an opportunity for this Court to decide whether it is appropriate to announce a rule that the State of domicile of either spouse has jurisdiction to adjudicate all issues presented in a marital separation proceeding at least where the non-domiciliary and non-resident spouse has been personally served with process within the forum state, where all of the requirements of procedural due process, including actual notice and a reasonable opportunity to be heard, have been met and where there has been no prior adjudication by another forum of any of the family law issues.

> "Domicile creates a relationship to the state which is adequate for numerous exercises of state power. [Citations omitted] Each State as a sovereign has a rightful and legitimate concern in the marital status of persons domiciled within its borders. The marriage relation creates problems of large social importance. Protection of offspring, property interests, and the enforcement of marital responsibilities are but a few of the commanding problems in the field of domestic relations with which the state must deal." *Williams v. North Carolina*, 317 U.S., at 298.

It is common knowledge that divorces are increasing in this country. As previously noted, technological progress has resulted in an increase in the mobility of the citizens of this country. Thus, it is not unusual for spouses to wind up in different states after separation but before judicial proceedings relating to that separation

have been commenced. In this case, husband helped create the interstate family relationship. Under the Constitution, the regulation and control of marital and family relationships are reserved to the States and a State has the power to determine the incidents of those relationships in which its domiciliaries are involved. *Sherrer v. Sherrer, supra,* 334 U.S., at 354; *Williams v. North Carolina, supra,* 317 U.S., at 304-305 (Frankfurter, J. concurring). Under the facts and circumstances of this case, why should one separated spouse who chose to stay and begin a new life in familiar surroundings be rewarded while the other separated spouse who chose to travel to another state and begin a new life in a new place be penalized? In our mobile society, moving to a new environment when a marriage breaks up is not a transgression.

The livelihood and support of the wife and children is a problem with which the State of their domicile is properly concerned (*Estin v. Estin, supra,* 334 U.S., at 547) and, where the concerns of procedural due process have been met, such state of domicile should be allowed to adjudicate all of the family law issues incident to the proceeding before it, so that those issues can be comprehensively dealt with rather than requiring the various incidents of a family law cause of action to be chopped up. See *Vanderbilt v. Vanderbilt, supra,* 354 U.S., at 423-435 (Frankfurter, J., dissenting). Such a rule permitting the State of domicile of one spouse, under such circumstances, to adjudicate all of the family law issues would advance the "orderly administration of the laws", limit the piecemeal litigation of family law issues, and lend "a

degree of predictability" and certainty to the jurisdictional inquiry without sacrificing fairness. See *World-Wide Volkswagen, supra,* 444 U.S., at 297.

A DECISION UPHOLDING CALIFORNIA'S POWER TO EXERCISE IN PERSONAM JURISDICTION OVER HUSBAND IN THIS CASE WOULD NOT CONSTITUTE AN UNWARRANTED INTERFERENCE WITH SOCIAL POLICY OF ENCOURAGING VISITATION

The recognized exceptions to the traditional "presence" rule of jurisdiction, i.e., presence induced by fraud and immunity from service when presence is related to participation in litigation within the jurisdiction of the forum, are accommodations of common law as developed within each individual judicial system, state or federal. (See *Wyman v. Newhouse,* 98 F.2d 313 [2 Cir., 1937]; *Lamb v. Schmitt,* 285 U.S. 222 [1931]; *Stewart v. Ramsay,* 242 U.S. 128 [1916] and cases cited therein). So, too, is social policy of encouraging visitation between divorced or separated parents and their children as well as other family law related social policies particularly a matter of state law. Husband appears to recognize this truth in his brief ("All states" recognize a policy of encouraging divorced parents to maintain an ongoing relationship with their children. [Petitioner's Brief on the Merits, page 38]). The regulation and control of marital and family relationships are reserved to the States and this Court has not conceived it to be a part of its function to weigh the policies of the respective states regarding family law matters. *Sherrer v. Sherrer, supra,* 334 U.S., at 354. *Williams v. North Carolina, supra,* 317 U.S., at 303.

> "We are not authorized nor are we qualified to formulate a national code of domestic relations. We cannot, by making 'jurisdiction' depend . . . upon the shifting notions of policy concealed by the cloudy abstraction of 'matrimonial domicile,' turn this into a divorce and probate court for the United States." Id., 317 U.S., at 304-305 (Frankfurter, J., concurring).

The opinions of this Court dealing with parental rights issues and cited by husband at pages 36 and 37 of his Brief on the Merits, all involve the rights and interests of unmarried natural fathers with respect to their illegitimate children (except that in *Michael H. v. Gerald D.*, 109 S. Ct. 233 [1989] the child was not technically illegitimate because it was conceived and born while its mother was married to Michael H.). They all involve situations where the asserted parental rights *as a father* were categorically cut off altogether and, as a result, there would be no contact between father and child. See *Stanley v. Illinois*, 405 U.S. 645 (1972); *Quilloin v. Walcott*, 434 U.S. 246 (1978); *Caban v. Mohammed*, 441 U.S. 380 (1979); *Lehr v. Robertson*, 463 U.S. 248 (1983); and *Michael H. v. Gerald D., supra*. Under the facts of the instant case there is no question of husband's parental rights being terminated nor are his rights to visit his children, in fact, being limited.

It is true, as husband correctly sets forth in his Brief on the Merits, that California does have a social policy of encouraging visitation between divorced or separated parents and their children. It is clear from a review of the Authorities cited by husband in his Brief (pages 38, 39) that the California courts have been careful to protect the right of visitation between parents and children and to

foster the visitation policy in appropriate cases. However, it is the law of California, as expressly applied by the courts of that state to this case, that the exercise of *in personam* jurisdiction over husband will not interfere with the social policy of encouraging such visitation (JA 35).

In deciding the jurisdictional issue presented by this case, the Court must focus not only on husband's parental and other rights but also on the important rights of the wife and children. They have a right to a convenient forum in their home state for the resolution of the family law issues affecting their lives as long as, under all of the facts and circumstances of this case, that is not an unfair forum in which to require husband to litigate. They have the right to a stable and nourishing home environment not unnecessarily disrupted by wife's being required to travel between California and New Jersey to litigate the family law issues of this case, either leaving the children behind in the temporary care of a stranger or uprooting them from their normal environment and routine and, in either event, incurring the additional expenses involved.

CONCLUSION

If the requirement of reasonableness is met, measured by the standard of traditional notions of fair play and substantial justice, then California's power to exercise *in personam* jurisdiction over husband under the facts and circumstances of this case should be recognized. For all of the foregoing reasons it is respectfully submitted that the exercise of *in personam* jurisdiction over husband in this case is fair, just and reasonable. Therefore, it is

respectfully requested that this court issue an opinion upholding California's exercise of *in personam* jurisdiction over husband and affirming the Decision of the California Court of Appeal.

Respectfully Submitted,

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APPENDIX I

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
A-1522-88T2
A-5705-87T2

DENNIS BURNHAM,

Plaintiff-Appellant,

v.

FRANCIE BURNHAM,

Defendant-Respondent.

ORIGINAL FILED

JUL 24 1989

Argued June 6, 1989 – Decided

Before Judges Antell and Brochin.

On appeal from Superior Court, Chancery Division, Family Part, Sussex County.

Laurence J. Cutler argued the cause for appellant (Cutler & Celli, attorneys' Mr. Cutler, on the brief).

Ann O'Flanagan argued the cause for respondent.

PER CURIAM

Following execution by the parties of a property settlement agreement on July 8, 1987, defendant wife moved

to California with the two children of the marriage. The move was made with the acquiescence of plaintiff husband who, in fact, paid for the cost of transportation. Plaintiff filed his complaint for divorce in New Jersey on October 7, 1987, but did not serve defendant with process at this time. Defendant started suit in California against plaintiff for legal separation, custody and child support on January 5, 1988, and plaintiff was served by mail with the papers in that case on January 24, 1988. He was also personally served while on a business trip in that state.

After being served with the California suit papers, plaintiff, for the first time, made extraterritorial service on defendant of his New Jersey summons and complaint on January 30, 1988.

Plaintiff here appeals from an order dated June 3, 1988, dismissing the complaint which he filed in New Jersey on October 7, 1987. He also appeals from an order dated October 14, 1988, dismissing his second complaint for divorce and incorporation of the property settlement agreement, which he filed after the dismissal of his first complaint. We have consolidated both appeals for the purpose of review.

The determination of the Chancery Division to foreclose plaintiff from pursuing his claim for relief in New Jersey was grounded in the belief that plaintiff had deliberately and unfairly manipulated defendant into moving to California so that he could bring his divorce action in New Jersey where it would be the most convenient for him and most inconvenient for defendant, upon the fact that plaintiff failed to issue his summons within ten days after filing the complaint as required by *R.* 4:37-2(a), upon

considerations arising from the Uniform Child Custody Jurisdiction Act, *N.J.S.A.* 2A:34-35, and upon considerations of *forum non conveniens.*

We affirm both orders under review substantially for the reasons stated by Judge Graves for the Chancery Division, Family Part, in his detailed and comprehensive statement of reasons filed with the order of June 3, 1988.

APPENDIX II

Dennis

12/12 1987

Francie –

I now have a pretty clear idea of my calendar for the first half of '88, so here are my plans for visiting with Rachel & Ari.

Jan 22-24 — I'll be in S.F. for the weekend in between business appointments the week before & after. I'll ask Rachel to spend the weekend with me again, and we'll return to Mill Valley Sunday noon.

Feb 12-15 — I'm in Dallas while Rachel is out of school. I'm not sure if I can visit Feb 19-21 – I'll let you know.

April 21-24 — I'll be in The Bay Area on business. Can I attend Open House at school on Thursday? I'd like to take Rachel with me to

R.D.2 BOX 718A ANDOVER, NJ 07821 (201) 398-7378

Monterey for the weekend.

June 17 — My trade show in San Diego ends the same time Rachel's school ends. I want to send an airline ticket for her to fly to San Diego. We'll spend a week together (Disneyland, Knott's Berry Farm, San Diego Zoo, etc.) while driving up the coast. I think we'd be in Mill Valley by June 24 or June 25.

August — Sometime before school starts in the fall I'd like both Rachel and Ari to visit here with me at home; for about 7-10 days. Not sure yet of the dates, but there's plenty of time.

Enclosed is some mail that recently came. I've been forwarding most of your catalogs & magazines.

Happy holidays

Den

Supreme Court, U.S.
FILED
JAN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-44

In The

Supreme Court of the United States

October Term, 1989

DENNIS BURNHAM,

Petitioner,

vs.

CALIFORNIA SUPERIOR COURT,
COUNTY OF MARIN,

Respondent.

FRANCIE BURNHAM,

Real Party in Interest.

On Writ Of Certiorari To The California Court Of Appeal, First Appellate District, Division Five

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No. 89-44

In The

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DENNIS BURNHAM,

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vs.

CALIFORNIA SUPERIOR COURT,
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Respondent.

FRANCIE BURNHAM,

Real Party in Interest.

PETITIONER'S REPLY BRIEF ON THE MERITS

I. WIFE'S BRIEF ON THE MERITS IMPLICITLY CONCEDES THAT JURISDICTION OVER HUSBAND CANNOT BE BASED SOLELY ON THE FACT THAT HE WAS PERSONALLY SERVED IN CALIFORNIA.

A. Wife's Brief Reflects A Fundamental Misunderstanding Of The Doctrine Of Transient Jurisdiction.

Wife does not seriously attempt to defend the traditional doctrine of transient jurisdiction, on which she relied below. Instead, she takes the same position that she did in her Answer to the Petition for Writ of Certiorari – that the present case does not actually involve the

transient jurisdiction rule because she is a California resident, and Husband's presence in California when he was served was not "transitory, fleeting, momentary, casual or fortuitous". Wife's Brief on the Merits (hereafter "WB") 10, 19-20. This reveals a fundamental misunderstanding of what is at issue in this case.

There are only two existing methods of jurisdictional analysis. If the defendant is served in the state, no further inquiry needs to be made. If the defendant is not served in the state, before he can be required to defend the litigation there, an inquiry must be made regarding whether his contacts with the state are sufficient to satisfy traditional notions of fair play and substantial justice.

It is the first approach which is at issue here. Although the doctrine has been called "transient" or "gotcha" jurisdiction by commentators and in the decisions, it is not limited to such extreme situations. Rather, its theoretical foundation is based squarely on the belief that a state has jurisdiction over every individual who is served within its borders, regardless of any other considerations. This exercise of jurisdiction depends solely on the *fact of service in the state.*[1]

---

[1] Wife suggests that three decisions by this Court explicitly upheld the exercise of personal jurisdiction over a non-resident defendant, based solely on service in the state. This is incorrect.

The constitutional question in *Fauntleroy v. Lum*, 210 U.S. 230 (1908) (WB 14) was whether a court of one state was required to give full faith and credit to a judgment obtained in another state, where the judgment was based on an illegal contract.

New York v. O'Neill, 359 U.S. 1 (1959) (WB 16, 24) upheld a statute which permitted a citizen of Illinois, who was in Florida to attend a convention, to be taken into custody and transported to New York to testify as a witness before the grand jury.

Perkins v. Benguet Mining Co., 342 U.S. 437 (1952) (WB 16-17, 24) upheld personal jurisdiction over a non-resident corporation on a cause of action unrelated to its activities in the state because its general business there was continuous and systematic.

It is no defense of transient jurisdiction to say that because it has been a traditional basis for jurisdiction, it is therefore consistent with *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) and its progeny. WB 23-24. Under *International Shoe*, jurisdiction must satisfy traditional notions of *fair play and substantial justice*. 326 U.S., at 316. Transient jurisdiction may be traditional, but it is not fair play and does not accomplish what has come to be regarded as substantial justice. See, e.g., *Shaffer v. Heitner*, 433 U.S. 186 (1977) where the Court rejected the traditional doctrine of *quasi in rem* jurisdiction, stating that traditional notions of fair play and substantial justice can be offended by "ancient forms that are no longer justified." At p. 212.

B. The Procedural History Of This Case Establishes That The Only Reason The California Courts Upheld The Exercise Of Personal Jurisdiction Over Husband Was The Mere Fact That He Was Served While Present In The State.

Husband's motion to quash service for lack of personal jurisdiction argued that under *Shaffer v. Heitner, supra*, 433 U.S. 186 and *Kulko v. California Superior Court*, 436 U.S. 84 (1978) California could not exercise personal jurisdiction over him, unless he had the requisite minimum contacts with the state, which he did not. JA 11-14, Doc. #5, pp. 2-6.

If it were not for the fact that Husband was personally served while he was physically present in California, this case would have been governed by numerous California decisions which required that Husband's motion be granted. See e.g. *Kumar v. Superior Court*, 32 Cal.3d 689, 703-704, 652 P.2d 1003, 186 Cal.Rptr. 772 (Cal. 1982); *Titus v. Superior Court*, 23 Cal.App.3d 792, 799-805, 100 Cal.Rptr. 477 (Cal. Ct. App. 1972); *Judd v. Superior Court*, 60 Cal.App.3d 38, 41-46, 131 Cal.Rptr. 246 (Cal. Ct. App. 1976); *In re Marriage of Malak*, 182 Cal.App.3d 1018, 1023-1024, 227 Cal.Rptr. 841 (Cal. Ct. App. 1986); *Modlin*

v. Superior Court, 176 Cal.App.3d 1176, 1179-1182, 222 Cal.Rptr. 662 (Cal. Ct. App. 1986).[2]

Wife's opposition relied on now superseded section 28 of the Restatement, Second, Conflict of Laws, for the principle that a state has power to exercise jurisdiction over a defendant who is present within its territory, whether permanently or temporarily. She argued: "The first and most important basis for jurisdiction over the person of an individual is presence within the boundaries of the state. This is true of any person voluntarily within the state, whether he is a permanent resident or a temporary visitor; his presence gives the state power over him." Doc. #8, pp. 1-2.

Wife also submitted an affidavit she had filed in Husband's New Jersey divorce action, which contained allegations about his business contacts with California and visits there to spend time with his children. Doc. #6. If the trial court had believed that those contacts satisfied the minimum contacts test, it would have denied Husband's motion to quash. Instead, the trial court initially ruled that California did not have personal jurisdiction over Husband, and could only adjudicate the issue of marital status. JA 21-22.

Wife then filed a motion for reconsideration. Doc. #12. She argued that California had personal jurisdiction over Husband, based solely on the fact that he was served while he was present in California. Doc. #12, pp. 4-6. She stated:

> While counsel for [Husband], or anyone else may speculate regarding what the U.S. Supreme Court *might* do when the question is properly presented to it, the fact is that the Supreme Court has never abrogated the principle set forth in Restatement section 28. Nor has an appellate court in California ever done so with respect to the California counterpart.
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> Doc. #12, p. 6:6-11, emphasis in original.

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[2] These decisions are discussed in Husband's Brief on the Merits, and have been ignored by Wife.

Wife's argument continued:

> . . . because [Husband] is subject to in personam jurisdiction of the California courts on the basis on his presence in the state at the time of service of process, it is not necessary to even consider the question of "minimum contacts" under *International Shoe Co. v. Washington* (1945) 326 U.S. 310, 90 L.Ed. 95, 66 S.Ct. 154 and its progeny.[3]
>
> Doc. #12, p. 6:23-28.

At the hearing on Wife's motion to reconsider, Husband argued that every exercise of personal jurisdiction must meet the minimum contacts test. Doc. #17, p. 6:8-20. The trial court instead focused on the issue of personal service on Husband while he was present in the state and asked, "Do you have any cases in which the husband or the defendant was served in the State of California?" *Id.*, at p. 6:21-23. Neither counsel was aware of any such decision. *Id.*, at p. 6:24-28. The trial court took the matter under submission. *Id.*, at p. 13:17. It then accepted Wife's position and granted her motion to reconsider, ruling that California had personal jurisdiction over husband after all. JA 26.

In Husband's Petition for Writ of Mandate in the California Court of Appeal, he continued to argue that after *Shaffer*, service on a non-resident defendant in the state is insufficient to permit the exercise of personal jurisdiction. Wife's response argued that "husband's *presence within California while he was served* with the petition and summons is, *in and of itself*, a sufficient basis for the exercise of jurisdiction by the California courts." Wife's Return to Petition for Writ of Mandate at 7:2-5, emphasis added.

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[3] As a fallback position, Wife argued that the facts set forth in the affidavit she had previously filed satisfied the minimum contacts test. Doc. #12, pp. 6:28-7:9.

Since Wife had taken the fallback position that Husband had the requisite minimum contacts with California, Husband also explained why the trial court's ruling could not be sustained on that basis. Wife therefore also claimed that her affidavit supported jurisdiction under the minimum contacts test. Wife's Return at 7:6-9.

Just as the trial court had recognized that jurisdiction over Husband could not be upheld under a minimum contacts analysis, the Court of Appeal also declined to accept Wife's alternative argument that California could exercise personal jurisdiction on that basis. Instead, its holding was squarely grounded on Wife's argument that personal service on a non-resident while he was in the state, in and of itself, is a sufficient basis for personal jurisdiction. It stated: "that personal presence continues to be a valid jurisdictional predicate for in personam jurisdiction and that *Shaffer v. Heitner* (1977) 433 U.S. 186 does not compel a contrary conclusion. As the trial court noted, no California or United States Supreme Court case has applied *Shaffer*'s 'minimum contacts' analysis to a defendant present in the forum state and personally served with process." JA 34.

Husband then filed a Petition for Review in the California Supreme Court. Wife's Answer recognized that the only reason the California courts had upheld the exercise of personal jurisdiction over Husband was that he was served while present in California. She stated as follows: "Both the Superior Court and the Court of Appeal have determined that California can exercise personal jurisdiction over husband *because he was personally served with process while he was present in the state of California.*" Wife's Answer to Petition for Review at 5:23-26, emphasis added.

The foregoing chronology establishes that the California courts upheld the exercise of personal jurisdiction solely on the basis that Husband was served while he was present in the state, and rejected asserting personal jurisdiction on the basis that he had minimum contacts with

the state. Thus, if this Court now decides that service while present in the state is not sufficient, it should simply order that Husband's motion to quash be granted.

II. WIFE MISUNDERSTANDS HUSBAND'S ARGUMENT REGARDING THE SIGNIFICANCE OF THE FACT THAT HE WAS SERVED WHILE HE WAS IN CALIFORNIA TO SPEND TIME WITH THEIR CHILDREN.

Husband has consistently argued that exercising personal jurisdiction over a parent who is in a state for the purpose of spending time with his children should never be allowed because this would have a detrimental effect on the parent/child relationship. HB 34-44. The California courts have recognized the importance of this principle, and have applied it in considering whether to exercise personal jurisdiction over a non-resident parent based on a minimum contacts analysis. See decisions cited above on page 3.

The strong public policy of encouraging visitation was not given effect here, solely because the state courts were unwilling to abandon the transient jurisdiction rule. Accordingly, if this Court were to decide that personal service while the non-resident defendant is present in the state is no longer sufficient, and that all assertions of state court jurisdiction must be based on a minimum contacts analysis, it would not have to consider the extent to which the jurisdictional inquiry in a family law action should be affected by the countervailing considerations involving children.

On the other hand, this Court might decide to adopt a variant of the traditional rule. The due process question then would become how to decide what, if any, significance should be given to the fact that a non-resident parent was served while he was in a state to see his children. This was the context in which Husband argued that as a matter of constitutional doctrine, service on a non-resident parent should never be given any weight in

the jurisdictional equation. Wife's Brief is not responsive to Husband's central arguments on this point.

First, Wife argues that the regulation and control of marital and family matters is a state concern, and not a function for this Court. WB 47. Wife misses the point. This Court has held that whether a state can constitutionally exercise personal jurisdiction over a non-resident defendant depends, in part, on the extent to which doing so would further or frustrate the shared interests of the states in furthering fundamental substantive social policies. HB 34-35. Wife recognizes this principle. WB 31.

Where Wife goes wrong is to argue that Husband is suggesting that this Court establish a "national code of domestic relations". WB 48. Not so. He is only suggesting that this Court give significant weight in its jurisdictional analysis to the universal policy of encouraging visitation, which already exists. This well established public policy is precisely one of those shared state interests which is relevant in determining how the constitutional inquiry into personal jurisdiction should be resolved. Since Wife does not dispute that there is such a shared substantive policy, Husband's argument on this point stands essentially unrefuted.

Second, Husband argued that whether a state can constitutionally exercise personal jurisdiction over a non-resident defendant depends in part on the degree to which doing so would adversely impact the defendant's other constitutional rights. HB 35. Wife does not dispute that this is a correct theoretical approach. Instead, she attempts to distinguish the decisions on which Husband relied to establish that such other constitutional rights are implicated here. Wife points out that these decisions all involved situations where a parent's rights were going to be terminated. WB 48.

Again, Wife misses the point. The rationale underlying the decisions on which Husband relies is that this

Court has long recognized that fundamental constitutional rights are involved in the parent/child relationship. The fact that asserting personal jurisdiction over Husband would not terminate these rights, but simply have a chilling effect on exercising them, is a distinction without a difference.

Husband's Brief explained why it is inevitable that exercising personal jurisdiction over a parent who is served while he is in a state to spend time with his children will tend to discourage visitation. HB 40-44. Wife asserts that because the Court of Appeal stated that California's exercise of personal jurisdiction will not interfere with the policy of encouraging visitation, this is an issue of state law which should not be reviewed here. WB 48-49. Wife is incorrect.

The part of the Court of Appeal opinion on which Wife relies is not a factual finding, but a legal conclusion based on certain facts. The question of whether personal jurisdiction is constitutional on a given set of facts is always fundamentally a federal question which raises the interplay between constitutional rights and jurisdictional theory. Therefore, it should not be left to state courts to determine on a case-by-case basis, without principled guidance from this Court.

Third, Wife argues that "the Court must focus not only on Husband's parental and other rights but also on the important rights of the Wife and children." WB 49. Yet Wife acknowledges that the jurisdictional inquiry focuses primarily on the non-resident defendant's due process rights. WB 37.

If the children need additional support, it can easily be obtained through an action in New Jersey under the Revised Uniform Reciprocal Enforcement of Support Act. *Kulko v. California Superior Court*, *supra*, 436 U.S. at 98-99. As the Court stated in *Kulko*: "It cannot be disputed that California has substantial interests in protecting resident children and in facilitating child-support actions on behalf of those children. But these interests simply do not

make California a 'fair forum', *Shaffer v. Heitner, supra,* 433 U.S. at 215, in which to require [husband], who derives no personal commercial benefit from his child's presence in California and who lacks other relevant contacts with the state, either to defend a child-support suit or to suffer liability by default." At 100-101.

Whether the inconvenience to Wife from having to litigate the validity of the marital settlement agreement in New Jersey can outweigh Husband's due process rights, is discussed below in section III.B.

III. NONE OF WIFE'S OTHER ARGUMENTS IN SUPPORT OF CALIFORNIA'S EXERCISING PERSONAL JURISDICTION HAS ANY MERIT.

A. The Court Should Not Adopt The Reformulation Of Transient Jurisdiction Proposed In The Restatement.

Wife's present position is essentially to urge the Court to approve the reformulation of transient jurisdiction recently adopted in the Restatement, Second, Conflict of Laws section 28. WB 12, 21-23. Under it, jurisdiction can be exercised whenever a non-resident defendant is served in the state, unless this would be unreasonable.

Husband's Brief on the Merits explained why jurisdiction would not be proper here under the examples given in the Restatement for applying its approach. HB 48-49. Before responding to Wife's application of that rule here, Husband will explain why, in the first instance, the Court should not adopt the Restatement's new position.

First, it makes no sense to have a less stringent test for exercising jurisdiction over a non-resident defendant who is served while physically present in the state, and a more stringent test for a non-resident defendant who is served outside of the state. Having two different tests simply reflects an unwillingness to reject definitively the discredited myth that a state's jurisdiction is based on its

physical power over the defendant. It is a vestige of the outmoded approach to jurisdiction which this Court rejected in *International Shoe* and *Shaffer*. A full and final break should be made now. The Court should give effect to its statement in *Shaffer* that "all assertions of state court jurisdiction" should be judged by the minimum contacts test. 433 U.S., at p. 212.

Second, the Restatement's formulation establishes a presumption in favor of exercising jurisdiction over a non-resident defendant who is served in the state. It shifts the burden from the plaintiff, who usually must establish a basis for jurisdiction, to the defendant, who must now defeat it. This provides an incentive for plaintiffs to lure non-residents to a state, in order to serve them and thereby obtain an advantage from the presumption.

Third, the large body of law which has evolved around the "minimum contacts" test, which focuses on the nexus among the defendant, the forum, and the nature of the litigation, gives guidance to courts ruling on challenges to jurisdiction. As the Court intimated in *Shaffer*, this well developed body of law should be made applicable to all assertions of state court jurisdiction. Allowing a state court to exercise jurisdiction unless the non-resident can convince it that doing so is "unreasonable", under a less stringent standard than provided by the minimum contacts test, introduces a subjective element into the jurisdictional inquiry which is too elusive. The due process rights of non-resident defendants should not rest on such a slender reed.

B. None Of Wife's Arguments Establishes That It Is Reasonable For California To Exercise Personal Jurisdiction Over Husband.

Introduction

It is apparent that Husband's contacts with California are insufficient to justify its exercise of personal jurisdiction under a traditional minimum contacts analysis. His few business contacts have nothing to do with Wife's lawsuit. This Court held that jurisdiction was impermissible in *Helicopteros Nacionales de Colombia v. Hall*, 466 U.S. 408 (1984) where the defendant had substantially more contacts than Husband did here because those contacts were unrelated to the plaintiff's cause of action.

The fact that Husband allowed his children to move to California is also not the kind of act which gives rise to personal jurisdiction, even for a motion to increase child support. *Kulko v. California Superior Court, supra*, 436 U.S. 84. Accordingly, it certainly cannot be sufficient to support personal jurisdiction in Wife's action to set aside a marital settlement agreement.

Faced with these insurmountable problems, Wife does not attempt to fit this case into a traditional minimum contacts analysis. Instead, she offers a potpourri of reasons that purportedly make it "fair and reasonable" for California to exercise jurisdiction. WB 28-47. None of them has any merit, for the following reasons.

1. Running throughout Wife's Brief is the argument that it is not unreasonable to require Husband to litigate in California because judicial proceedings had not been initiated in New Jersey, before Wife and the children moved to California. See, e.g., WB 10-11, 32, 43.

Wife ignores the importance of the fact that the parties had entered into a complete written marital settlement agreement in New Jersey before she left. That agreement resolved every issue involved in the termination of their marriage. Moreover, the agreement provided

that it would be interpreted in accordance with New Jersey law and that any visitation disputes would be submitted to the New Jersey courts. See HB 2-3. Wife concedes that she expected Husband to file a divorce action in New Jersey (WB 3-5), and the agreement provided that it would be incorporated into whatever action was filed.

Therefore, this is far from a situation where Husband reasonably could have expected to be haled into a California court to litigate all of the issues arising from the termination of their marriage. On the contrary, he had every right, and every reason, to expect that this would not occur. Compare *Hanson v. Denckla*, 357 U.S. 235, 252 (1958), where the Court found no jurisdiction, noting that the lawsuit "involves the validity of an agreement that was entered into without any connection with the forum state." See also 357 U.S. at 254.

2. Wife asserts that Husband reasonably should have expected to be haled into a California court because he agreed to file for a divorce in New Jersey on the ground of "irreconcilable differences", and instead he filed on the ground of "sexual desertion". WB 4-5, 32.

This new argument reveals the true motivation of Wife's attempt to use a California court to upset the marital settlement agreement. It appears that Wife would not have attacked the agreement, nor filed this action, if only Husband had sought a divorce in New Jersey based on irreconcilable differences. Wife's wounded feelings, resulting from Husband's seeking a divorce based on

sexual desertion, are not a valid reason to force Husband to defend this action in California.[4]

Moreover, this Court has held that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the due process clause." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (1980). For instance, the Court pointed out that it was foreseeable in *Kulko* that the mother, who had moved to California, would ask for an increase in child support when the children came to live with her, yet California did not have jurisdiction because the father did not have sufficient contacts with California. 444 U.S., at 296.

3. Wife claims Husband had "fair warning" that he would be served when he visited the children because his business partner told him Wife had initiated a legal action in California. WB 11, 20, 44. This is a non-sequitur. The jurisdictional issue is whether, at the time of the transaction giving rise to the plaintiff's cause of action, the nonresident defendant reasonably could have anticipated being haled into a foreign state to litigate a dispute arising out of that transaction.

Wife's position actually supports Husband's argument that personal jurisdiction should never be based on service when a parent comes to a state to see his children.

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[4] Some of Wife's factual assertions on this issue are not supported by any record references and should be disregarded. See WB 4-5. The reason Husband did not seek a divorce in New Jersey based on irreconcilable differences is that ground requires an eighteen month wait. Doc. #6, p. 7, ¶15. Nor was Husband's assertion of sexual desertion false. Wife acknowledged that they ceased having sexual relations long ago. Doc. #6, p. 2, ¶3.

Moreover, Husband had no objection to Wife obtaining a marital dissolution in California based on irreconcilable differences, as long as it incorporated their marital settlement agreement. The parties could obtain a divorce in New Jersey based on irreconcilable differences now because eighteen months have elapsed since they separated.

Her position essentially reduces to imposing on Husband the Hobson's choice of having to defend against her California action because he was warned about it, or not spending time with his children. This is not a policy which should be fostered.

4. Wife argues that California has an interest in adjudicating this dispute which should permit it to exercise personal jurisdiction over Husband. WB 34-36.

The Court rejected such an argument in *Kulko*, and rightly so. 436 U.S., at 93-101. Adopting this reasoning would permit a custodial parent to obtain personal jurisdiction over a former spouse, in any state where she eventually decides to live with the children. Not only would this be extremely unfair, but it would discourage the harmonious resolution of family disputes by creating conflicts over whether one parent should allow the other to move to another state with the children.

Wife attempts to distinguish *Kulko* on the ground that it involved a post-judgment motion for modification. WB 40-44. This is a distinction without a difference. The parties here had settled their marital disputes before Wife left New Jersey and moved to California.

Wife relies on *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770 (1984) and *Calder v. Jones*, 465 U.S. 783 (1984) to argue that her current California residence is an important factor in the jurisdictional inquiry. WB 34-35. Neither decision supports her position. Those were both tort actions in which jurisdiction was upheld because the nonresident defendants' activities were directed at, and caused harm in, the state. Sending children to a state is not within that rule. *Kulko*, at pp. 96-97.

5. Wife argues that this Court should reverse many older decisions and hold that whenever a state has jurisdiction to dissolve a marriage and to adjudicate custody issues, it should also be able to litigate all issues relating to the family. WB 45-47. Wife gives no valid reason to support such a radical change in the law.

The reason a state can adjudicate issues relating to marital status and custody is that they involve "status" and cannot result in a judgment which requires the nonresident defendant to pay money to the plaintiff. *Kumar v. Superior Court, supra,* 32 Cal.3d, at 695-704.[5]

6. Wife relies on the fact that Husband made a yearly trip to California during each of the ten years before the parties separated. WB 11, 28.

These visits had nothing to do with any of the issues in Wife's family law action. Periodic travel to a state does not establish a sufficient connection between the nonresident defendant and the state to make it reasonable to require him to litigate a marital dispute there. See, by analogy, *Rosenberg Bros. & Co. v. Curtis Brown Co.,* 260 U.S. 516 (1923), cited with approval in *Helicopteros, supra,* 466 U.S. at 417-418, which held that purchases in a state at regular intervals, even coupled with visits to the state, are not a basis for jurisdiction unrelated to those transactions.

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[5] Moreover, in light of the Court's decision in *May v. Anderson,* 345 U.S. 528 (1953) there is a serious question as to whether the Uniform Child Custody Jurisdiction Act and the Parental Kidnapping Prevention Act are unconstitutional insofar as they allow a state to adjudicate child custody without personal jurisdiction over both spouses. See Sherman, *Child Custody Jurisdiction and the Parental Kidnapping Prevention Act – A Due Process Dilemma,* 17 Tulsa L.J. 713 (1982). This is a thicket which the Court need not enter in the present case.

Wife also notes that during the months before Husband was served, and since then, his trips became more frequent. WB 28. The record establishes that the reason for this is to spend more time with his children.[6]

7. Wife argues that personal jurisdiction over Husband is proper because he availed himself of public and private facilities in California, and derived tax and other benefits from his activities in California. WB 29.

Whatever benefits Husband obtained from his business activity were unrelated to Wife's action. The fact that a parent allows his children to live in a state is a benefit to the children, not to the parent. *Kulko, supra,* 436 U.S., at 94-96. Whatever tax benefits Husband obtained from combining his visits to see his children with business in California derived from federal law, not state law. Accordingly, it is not a benefit that can justify California's exercise of jurisdiction.

8. Wife relies on the New Jersey courts wanting California to exercise personal jurisdiction over Husband in her action. WB 6-8, 35-36.

Nothing in the New Jersey trial court order that was before the California trial court supports this conclusion. Its comments regarding jurisdiction were limited to which state would be better able to implement the policies of the Uniform Child Custody Jurisdiction Act. See HB 48.

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[6] Wife asserts that Husband "undoubtedly will continue" to make business trips to California. WB 37-38. Wife knows this is false. She is aware that Husband's partners bought out his interest in the business during the summer of 1989. With Wife's consent, funds from this sale are being held in escrow pending the outcome of this litigation. Thus, Husband no longer has any reason to come to California except to see his children.

Contrary to the implication which wife attempts to create (WB 6-8, 35-36), the issue of whether Wife executed the marital settlement agreement as a result of fraud or undue influence has not actually been litigated on the merits in New Jersey. It is circular reasoning to assume that the agreement is invalid and use that as a basis for establishing jurisdiction in California.

Moreover, Husband is not attempting to obtain jurisdiction over Wife in New Jersey on the ground that the agreement was executed there. WB 36, citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985). New Jersey has jurisdiction because Husband has always resided there and Wife had substantial marital contacts there before she left.

It is ironic that Wife continues to want to litigate the validity of the agreement in California. If her characterization of the attitude of the New Jersey courts is correct, it appears that she might prevail there on the merits.[7]

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[7] Husband objects to Wife having appended the New Jersey Court of Appeal decision to her Brief. It is not part of the record in the California action. The circumstances under which the New Jersey action was tried, briefed, and decided on appeal, are outside this record and beyond the scope of this Court's consideration.

For instance, the opinion erroneously states that Husband "manipulated [Wife] into moving to California so that he could bring his divorce action in New Jersey . . . " WB, App. 2. Wife's own declaration, filed in the California action, demonstrates that it was she who wanted to move to California. JA 17. She never asserted that Husband manipulated her into moving to California. See WB 3-4 [Husband threatened to restrain Wife from moving to California].

9. Wife contends that it will be no actual burden on Husband, if he is required to litigate her action in California because he litigated the jurisdictional dispute and he will continue to come to California to spend time with their children. WB 37-38.

The fact that Husband retained counsel to object to jurisdiction cannot support the conclusion that it would not impose a burden on him to litigate the merits. If such an argument were accepted, no one could ever successfully object to jurisdiction. Husband's visits with his children should be for the purpose of developing his relationship with them as they grow. They should not be marred by his attendance at depositions and court hearings, which could be numerous and extensive. See HB 40-42.

Even if Husband has a higher degree of mobility than Wife (WB 39), this is not a valid reason for permitting California to exercise personal jurisdiction. The restrictions on personal jurisdiction "are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective states." *Hanson v. Denckla, supra*, 357 U.S., at 251. See also *World-Wide Volkswagen Corp. v. Woodson, supra*, 444 U.S., at 292 where the Court reiterated that the minimum contacts test not only protects the defendant against the burdens of litigating in a distant or inconvenient forum but it also "acts to ensure that the states, through their courts, do not reach out beyond the limits imposed on them by their status as co-equal sovereigns in a federal system."

Moreover, Wife created this situation by leaving New Jersey. Giving significant weight to her current inconvenience in the jurisdictional calculus would allow the custodial parent to establish the basis for personal jurisdiction, anywhere she decides to move with the children.

10. Finally, Wife asks the following rhetorical question: "Under the facts and circumstances of this case, why should one separated spouse who chose to stay and begin a new life in familiar surroundings be rewarded while the other spouse chose to travel to another state and begin a new life in a new place be penalized?" WB 46.

This question has a simple answer, which Wife simply refuses to acknowledge. This is not a matter of penalizing or rewarding anyone. It is a matter of protecting Husband's due process rights and drawing constitutional limits on the ability of one state to adjudicate the rights of a citizen of another state.

Wife can still litigate the validity of the marital settlement agreement in New Jersey, as she could have done before she left there and moved to California. It would be unfair and unreasonable to require Husband to do so in California.

CONCLUSION

For all of the foregoing reasons, and based on the foregoing authorities, it is respectfully submitted that this Court instruct the California Court of Appeal to issue a writ of mandate, compelling the California Superior Court to grant Husband's motion to quash for lack of personal jurisdiction, or that this Court itself direct the Superior Court to do so.

Respectfully Submitted,

DE GOFF AND SHERMAN

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